Supreme Court U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 2007

ROLAND JOHNSON,

Petitioner,

vs.

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When the Supreme Court decides a case and applies the new legal rule of that case to the parties before it, then it and other courts must treat that new same legal rule as "retroactive," applying it, for example, to all pending cases, whether or not those cases involve pre-decision events. Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993); Reynoldsville Casket Co., et al., v. Carol L. Hyde, 514 U.S. 749; 115 S.Ct. 1745, 131 L.Ed. 2d 820; 1995 U.S. Lexis 3182.

Question Presented:

1. Did the United States Court of Appeals for the Second Circuit fail to give full retroactive effect to the Supreme Court's Decision in Burlington Northern & Sante Fe Railway v. White, which created a new standard for determining adverse employment action in Title VII retaliation cases, when it denied Petitioner's Petition for Rehearing En Banc on November 29, 2006, while Petitioner's case was still open on direct review as to whether Petitioner suffered an adverse employment action in his Title VII retaliation lawsuit?

PARTIES TO THE PROCEEDING

1. Petitioner in this case is Roland Johnson, a former employee of the United States Postal Service.

2. Respondent is John E. Potter, Postmaster of the United States Postal Service.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES iv

TABLE OF CITED AUTHORITIES v

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Facts 3

B. The Proceedings Below 11

REASONS FOR ALLOWANCE OF THE WRIT 13

I. The Court of Appeals Decision Conflicts with the Authority of this Court 13

A. Petitioner is Entitled to the Retroactive Effect of Burlington Northern 14

B. Burlington Northern is Applicable to the Petitioner's Case 16

CONCLUSION 20

APPENDIX

Page

Order of the U.S. Court of Appeals for the Second Circuit Denying Petition for Rehearing, Filed November 29, 2006 ..... A1

Summary Order of the United States Court of Appeals for the Second Circuit, Dated and Filed June 7, 2006 ..... A3

Judgment of the United States District Court for the Western District of New York, Dated September 27, 2005 ..... A7

Petition for Rehearing *En Banc*, Undated A40

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Burlington North & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006) ..... *passim*

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 14,15

Davis v. Michigan Department of Treasury 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed. 2d 891 14

Galabya v. New York City Bd. Of Educ., 202 F.3d 636, 640 (2d Cir 2000) ... 11,12,13, 14,16

Harper v. Virginia Department of Taxation, 509 U.S. 86; 113 S.Ct. 2510 13,14,15,18

In re Federated Dep't Stores, Inc., 44 F.3d 1317 (6th Cir. 1995) 15

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543 (1991) 15

Johnson v. Frank, et al, 90-cv-07138 (CJS) 3

Johnson v. Potter, 04-cv-6239 (CJS) 4

McDonnell Douglass 411 U.S. 792 (1973) 19

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 16

Page(s)

Rochon v. Gonzales,
438 F.3d 1211, 1219 17

Swierkiewicz v. Sorema, 534 U.S. at 508 ... 18,19

Swierkiewicz v. Sorema,
N.A. 5 F. App'x 63 (2d Cir. 2001) 18

Washington v. Ill. Dep't of Revenue,
420 F.3d 658, 662) 17

Statutes

28 U.S.C. §1254(1) 2

29 CFR §1614.605 7

42 U.S.C.§ 2000e 2,3,4

42 U.S.C. § 2000e-3(a) 3

Fed. R. Civ. P. Rule 12(b)(6) 18

Fed. R. Civ. P. Rule 15(a) 7

Fed. R. Civ. P. Rule 56(f) 10,11

Other

2 EEOC Manual § 8 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner sought rehearing *en banc* on or about July 19, 2006 from the denial of an appeal dated June 7, 2006. The appeal was taken from a judgment of the United States District Court for the Western District of New York (Siragusa, J.), filed September 27, 2005 (App. A-7-8), upon a Decision and Order filed on September 16, 2005, granting respondent's pre-discovery Motion to Dismiss on the basis that petitioner "failed to demonstrate a prima facie case of adverse employment action." (App., A 9-39). The basis for the request for rehearing on July 19, 2006 was that the United States Supreme Court had issued it's decision in Burlington Northern & Sante Fe Railway Co. V. White, No. 05-259, on June 22, 2006, which the Court unanimously created a new standard for determining "adverse employment action," and for which Petitioner was entitled to have applied retroactively.

Petitioner's request for rehearing was denied on November 29, 2006. (App., A 1-2).

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is attached hereto at App., A 4-6. The order denying the petition for rehearing and for rehearing en banc is attached hereto as App., A 1-2. The memorandum decision of the district court is attached hereto as App., A 9-39.

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals was issued June 7, 2006, and the petition for rehearing and for rehearing *en banc* was denied on November 29, 2006. This Court has jurisdiction over this petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.§ 2000e, *et seq.*

STATEMENT OF THE CASE

This case is about whether petitioner adequately alleged he suffered an "adverse employment action" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), which prohibits employers from discriminating against ~~workers~~ in retaliation for certain conduct. In this regard Section 704(a) provides that: "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has apposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Id.

A. The Facts:

Petitioner commenced this action against the respondent on December 29, 2004 (App., A 45-76), upon receipt of two Notices of Right to Sue dated December 17, 2004, and December 22, 2004. In his complaint, Petitioner claimed several acts of retaliation under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e et. seq., culminating in a retaliatory constructive discharge, and that Petitioner suffered a constructive discharge based on cumulative events.

In or about November 26, 1991, Petitioner filed his first suit against Respondent claiming discrimination and retaliation under Title VII. See Johnson v. Frank, et al, 90-CV-07138 (CJS).

(hereinafter "*Johnson I*") which eventually went to trial before the Honorable Charles J. Siragusa on November 24 of 1998, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C §§2000, et. seq., in Federal District Court for the Western District of New York.

The issues at the November 1998 trial centered on Petitioner's claim that Respondent had demoted and denied him promotional opportunities in retaliation for prior protected activities by seeking to unilaterally abolish Petitioner's position as a Window Clerk in the Box Section. The parties settled the matter two days into trial.

Petitioner resumed work with Respondent as a Claims and Inquiry Clerk, PS-5 level, a position he had successfully bid on in or about September 1998.

On January 15, 2002, petitioner filed his second civil lawsuit in the Western District of New York, Johnson v. Potter, 04-cv-6239 (CJS) (hereinafter *"Johnson II"*), alleging retaliation after completion of his civil trial in 1998.

On April 8, 2003, petitioner filed an Amended Complaint alleging continuing retaliation. On April 21, 2003, while *Johnson II* was pending, Petitioner filed a formal complaint with the EEO, (EEO case no. 4B-140-0036-03), claiming the following acts of discrimination based on disability (Diabetes Type II, anxiety disorder, and hypertension) and prior EEO activity:

1. Falsification of time by Maryann Molenda, Manager of Consumer Affairs & Unknown Members of the Attendance Control Office;

2. A continuing pattern of discriminatory harassment and retaliation by Laura Lewis, Manager of Marketing , Diane Mineo, manager of the Business Service Network, Mary Tarzia, Human Resource Specialist;

3. Continuing pattern includes failure to promote. (A-241).

On May 12, 2003, discovery in *Johnson II* concluded. (SPA-32).

On June 21, 2003, Petitioner filed a formal complaint with the EEO (EEO case no. 4B-0043-03), claiming the following based on race, disability and retaliation for having engaged in prior EEO activity:

> "During a May 14, 2003 closed-door meeting with marketing manager Laura Lewis, she referenced prior EEO activity, verbally threatened me, my job, and attempted to change the duties of my job, after I refused to discuss her unwelcomed behavior (of a sexual nature) which was presented to her via certified mail."

On August 15, 2003, Petitioner resigned from his position with the Post Office, claiming he was constructively discharged.

On September 4, 2003, Petitioner sought to have the above named EEO cases, 4B-140-0036-03 and

4B-140-0043-03 amended to add a claim of "constructive discharge" stating the following:

> This is a request to amend the above cited complaints to include a "constructive discharge" claim after learning on August 13, 2003 and August 14, 2003 that an involuntary deduction of $6808.00 taken by the Postal Service to pay my creditors during my 1998 civil trial has not been paid.[1] The callous and outrageous and intolerable treatment & working conditions I was FORCED to quit because of the persistent harassment and the callous and outrageous [treatment].

Historically, Petitioner had amended his EEO complaints on numerous occasions with no difficulty.

On September 5, 2003, respondent informed petitioner that he had to specify *which* EEO complaint he sought to amend within ten (10) days. (A-245).

On September 13, 2003, via certified mail, Petitioner informed respondent of the following:

> This is a request to amend the above cited complaint specifically EEO case #

---

1 Potter produced an affidavit resolving this matter for the first time in their response to Johnson's Motion for Summary Judgment in *Johnson II.*

> 4B-140-0043 to include a "constructive discharge" claim. This comes after persistent management harassment and a 8/13/03 & 8/14/03 revelation that an "involuntary deduction" of $6408.00 by the agency to pay my creditors during a 1998 civil trial has not been paid.

Petitioner heard nothing else from Respondent with regard to his amendment toEEO complaint 4B-0043-03 , and presumed it was duly amended as it had been in the past.

On September 25, 2003, ten (10) days after receipt of petitioner's *second request* to amend EEO complaint no. 4B-0043-03 on September 15, 2003, respondent informed Petitioner that it would cease investigation of the constructive discharge claim, and issued a "Notice to File a Mixed Complaint" with the MSPB, despite the fact that Petitioner had already elected to proceed with EEO when he filed his September 4, 2003 EEO complaint.

It should be noted that the September 25, 2003 letter was **not** mailed via certified mail to Petitioner as Respondent had done in the past. Instead, it was sent to Petitioner's counsel solely, in total contradiction to well established policies regarding sending such notice via certified mail, and policies regarding notice pursuant to 29 CFR §1614.605.

In or about May 14, 2004, Petitioner filed for summary judgment in his civil lawsuit and also moved to amend his complaint pursuant to Rule 15(a) to add the claim of "constructive discharge" as being

reasonably related to the claims at bar for the sole purpose of having all the claims heard together at one time, since no Notice of Right to Sue had been issued by the EEO on petitioner's claims of retaliation and constructive discharge since they were filed in May, June and September of 2003.

The lower court declined to permit petitioner leave to amend his complaint on September 16, 2005. The denial of leave permitting Petitioner to amend his complaint to add the claim of constructive discharge was not on the merits of the amended complaint. Rather, the lower court acknowledged that the deadline for amending the pleadings in *Johnson II* was December 12, 2002, and that Petitioner's constructive discharge did not occur until August 15, 2003, over a year later, and months after the close of discovery in Johnson II on May 12, 2003. Yet, the lower court determined that there was no "good cause" for the delay between Petitioner's constructive discharge of August 15, 2003, and his motion to amend the complaint on May 14, 2004, further noting that if Petitioner's constructive discharge claim was not at that time administratively exhausted, then it was "not properly the subject of a motion to amend."

On December 17, 2004, Petitioner received two Notices of Right to Sue with regard to EEO complaint 4B-140-0036-03 & complaint 4B-0043-03. However, Respondent failed to amend Petitioner's EEO complaint 4B-0043-03 to include his charge of constructive discharge.

On December 29, 2004, Petitioner filed his third complaint, in the instant matter (hereinafter *Johnson III*), with the United States District Court, Western

District of New York, 04-cv-6634(CJS), alleging retaliation and retaliatory constructive discharge, outlining the entire course of Appellee's conduct since Petitioner's 1998 civil trial.

While the factual background underlying Petitioner's second and third complaint is essentially the same, they are not identical: Petitioner included several new allegations in his third complaint. These actions, including the background evidence contained in the complaint, cumulatively led to Petitioner's allegation that he was constructively discharged .

On February 29, 2005, the lower court dismissed the complaint in *Johnson II*, determining that Johnson was not subject to any adverse employment action.

On March 2, 2005, Petitioner filed an Amended Complaint in *Johnson III*.

On March 14, 2005 Respondent accepted service of Petitioner's Amended Complaint. A month later, prior to filing its answer, Respondent filed a Motion to Dismiss and for Summary Judgment on April 27, 2005, alleging Petitioner failed to:

1) exhaust his administrative remedies because he did not file a formal complaint with regard to his claim of constructive discharge;

2) failed to file a timely claim for constructive discharge because he had gone out on disability leave a month earlier, and should

have filed his complaint when he went out on disability leave;

3) that regardless of whether Petitioner' claim for constructive discharge is timely or not, it is barred by collateral estoppel; and,

4) that Petitioner cannot establish his prima facie case of retaliation.

In response, Petitioner filed a Cross Motion seeking a Continuance of Discovery pursuant to Rule 56(f), and tendered a comprehensive Rule 56(f) Affidavit setting forth the (1) identity of the probable facts not available and their relevance; (2) an explanation of why facts precluding summary judgment cannot be presented; and (3) a specific statement on how the desired time would enable Petitioner, the non-moving party in the instant matter, to meet its burden in opposing Respondent's Motion for Summary Judgment.

On September 16, 2005 the lower court granted Respondent's Motion to Dismiss and for Summary Judgment, and denied Petitioner's Cross Motion for a Continuance of Discovery pursuant to Rule 56(f), claiming that no discovery was necessary and that Petitioner failed to state a prima facie case of retaliation because he could not demonstrate that he suffered an adverse employment action and that he failed to demonstrate that he suffered a constructive

discharge. (App., A 9-39).

B. The Proceedings Below:

1. The Complaint

Petitioner's Complaint was filed on December 29, 2005 in the District Court for the Western District of New York. (App., A 45-76).

2. The September 16, 2005 District Court Decision

On September 16, 2005 the lower court granted Respondent's Motion to Dismiss and for Summary Judgment, and denied Petitioner's Cross Motion for a Continuance of Discovery pursuant to Rule 56(f), claiming that no discovery was necessary and that Petitioner failed to state a prima facie case of retaliation and constructive discharge. (App., A 9-39).

3. The June 7, 2006 Second Circuit Court of Appeals Decision

On June 7, 2006, the Second Circuit determined that Petitioner failed "to state a prima facie case of adverse employment which is necessary to any claim of retaliation under Title VII." citing the Second Circuit's decision in Galabya v. New York City Bd. Of Educ., 202 F.3d 636, 640 (2d Cir 2000), which held "a plaintiff sustains an adverse employment action if he or she endures a 'materially adverse change' in the terms and conditions of employment." (App., A 4-6).

4. The June 22, 2006 Decision of Burlington North & Santa Fe Railway Co. v. White

On June 22, 2006 this Court unanimously decided the case of Burlington North & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006), which established that the "materially adverse" standard to be judged objectively through the eyes of a reasonable employee in the Plaintiff's position and dependent upon the circumstances of each particular case, thus superceding the standard employed by the Second Circuit, inter alia, for determining adverse action as set forth in Galabya, supra., i.e., that the standard to be used is whether there was a "materially adverse change to th terms and conditions of employment."

5. The July 19, 2006 Petition for Rehearing and For Rehearing En Banc

On July 19, 2006, while still on direct review, a petition for rehearing and rehearing *en banc* was submitted to the Second Circuit setting forth the new standard enunciated in Burlington Northern as the basis for the request for rehearing. (App., A 40-44). The Second Circuit denied the petition for rehearing and rehearing *en banc*, despite this Court's intervening decision in Burlington Northern, and the fact that petitioner's case was still open on direct review. (App., A 4-6).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Decision Below Conflicts With Authority of this Court

This Court has recognized that claims for retaliation under Title VII must be examined not as to whether a plaintiff suffered a "materially adverse change in the terms and conditions of employment, " but rather whether " a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006).

This Court has also recognized that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." Harper v. Virginia Department of Taxation, 509 U.S. 86; 113 S.Ct. 2510; 125 L.Ed. 2d 74; 1993 U.S. LEXIS 4212; 61 U.S.L.W. 4664; 16 Employee Benefits Cas. (BNA) 2313; 93 Cal. Daily Op. Service 4491; 93 Daily Journal DAR 7730; 7 Fla. L. Weekly Fed. S 456.

The Court of Appeals failed to apply Burlington Northern retroactively while Petitioner's case was still on direct review in violation of the principles of retroactivity set forth in Harper. In denying Petitioner rehearing and rehearing *en banc*, the Court

of Appeals determined that Petitioner failed "to state a prima facie case of adverse employment which is necessary to any claim of retaliation under Title VII, " relying not on this Court's new standard as set forth in Burlington, but the Second Circuit's decision in Galabya v. New York City Bd. Of Educ., 202 F.3d 636, 640 (2d Cir 2000), which states. "a plaintiff sustains an adverse employment action if he or she endures a 'materially adverse change' in the terms and conditions of employment." Id. The Court of Appeals' holding contradicts this Court's authority set forth in both Burlington Northern and Harper. These two lines of authority compel the conclusion that the adverse employment action standard announced in Burlington North should be applied to Petitioner's case retroactively.

A. Retroactive Application of Burlington Northern & Santa Fe Railway v. White

In Harper this Court held that its decision in Davis v. Michigan Department of Treasury 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed. 2d 891 applied retroactively to retired federal employees seeking refunds for taxes imposed on their federal retirement benefits by the state of Virginia. This Court abandoned the balancing test articulated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), developing a new standard for determining retroactivity in civil cases:

> [O]ur decision today makes it clear that the Chevron Oil test cannot determine the choice of law by relying on the

> equities of the particular case" and that the federal law applicable to a particular case does not turn on "whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application" of a new one.

Id. At 95 n. 9. (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543 (1991) (Souter, J)); see also In re Federated Dep't Stores, Inc., 44 F.3d 1317 (6th Cir. 1995)(recognizing that Chevron Oil has been overruled by Harper). This Court in Harper held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97. Further, the Court in Harper invoked the Supremacy Clause and rejected Virginia's argument that states have the ability to limit the retroactive operation of federal law. 509 U.S. at 100 ("Whatever freedom states may enjoy to limit the retroactive operation of their own operation of state law[,].....cannot extend to their interpretations of federal law.") (citations omitted).

The Supreme Court detailed the process for consideration of retroactivity in Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) stating that:

> When (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it an other courts must treat that same (new) legal rule as "retroactive," applying it, for example, to all pending cases, whether or not those cases involve pre-decision events.

514 U.S. At 752.

Accordingly, Petitioner was entitled to have the new standard set forth in Burlington Northern applied retroactively to his Title VII retaliation case.

B. Applicability of Burlington Northern & Santa Fe Railway v. White

On June 7, 2006, the Second Circuit determined that Petitioner did not suffer an adverse employment action, citing Galabya for the proposition that an adverse employment action requires a *"materially adverse change in the terms and conditions of employment, " which is, however, the same conduct prohibited by the anti-discrimination provisions of Title VII.* The Supreme Court then determined on June 22, 2006 in Burlington Northern this was not the correct standard of law to determine whether an employee has suffered an adverse employment action. (See App., A 4-6).

In Burlington Northen, the Court ruled that in order for a plaintiff to prove an adverse employment action in an anti-retaliation case, she must "show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.." *Id.* at 2415, (citing, Rochon v. Gonzales, 438 F.3d 1211, 1219; quoting, Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662). Additionally, this ~~standard~~ "does not require a reviewing court or jury to consider the nature of the discrimination that led to the filing of the charge, [r]ather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint." *Id.* at 2416.

In setting forth this standard, the Supreme Court stated "we. . . reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provisions and that have limited actionable retaliation to so-called ultimate employment decisions. *Id.* at 2414.

The Supreme Court adopted a legal standard that speaks in general terms, as opposed to one that speaks in specific terms rationalizing that acts that are immaterial in some situations, are material in others. Id. at 2416; Washington, 420 F.3d at 661 (Id. at 2416; citing 2 EEOC Manual § 8 p 8-14, stating ". . . refusal to invite an employee to lunch is normally trivial, a non-actionable petty slight. But to retaliate against by excluding an employee from a weekly training lunch that contributes significantly to the employee's

professional advancement might well deter a reasonable employee from complaining about discrimination).

On July 19, 2006, Petitioner filed a petition for rehearing and for rehearing *en banc*, citing this Court's recent ruling changing the standard for determining adverse employment action. (App., A 40-44). The Court of Appeals denied the petition for rehearing and for rehearing *en banc* on November 29, 2006, while Petitioner's case was still on direct review. (App., A 1-3). Petitioner was entitled to the retroactive application of this Court's decision in Burlington Northern as set forth in Harper. Further, while a plaintiff ultimately bears the burden of proving, by a preponderance of the evidence, a prima facie case of discrimination, to prevail on a 12 (b)(6) motion to dismiss in a Title VII retaliation case, however, petitioner needed only to allege: (1) participation in a protected activity; (2) the defendant's knowledge of the protected activity; (3) adverse action by the defendant; and (4) a causal connection between the protected activity and the adverse action demonstrating a retaliatory motive, since it is well settled that "an employment discrimination complaint need not include [specific facts establishing a prima facie case of discrimination] and instead must only contain a "short and plain statement of the claims stating that the pleader is entitled to relief." Swierkiewicz v. Sorema, 534 U.S. at 508 (quoting Fed. R. Civ. 8 (a)(2)).

In Swierkiewicz v. Sorema, N.A. 5 F. App'x 63 (2d Cir. 2001) (unpublished order), the Second Circuit affirmed the district court's dismissal of

plaintiff's employment discrimination complaint because he failed to adequately allege a prima facie case of discrimination under McDonnell Douglass. The United States Supreme Court reversed the decision, holding that "an employment discrimination complaint need not include [specific facts establishing a prima facie case of discrimination] and instead must only contain a "short and plain statement of the claims stating that the pleader is entitled to relief." Swierkiewicz, 534 U.S. at 508 (quoting Fed. R. Civ. 8 (a)(2)). The Supreme Court based its holding on the fact that "[t]he prima facie standard under McDonnell Douglass ... is an evidentiary standard, not a pleading requirement." 534 U.S. at 510.

In this light, Petitioner seeks to have his claims remanded the District Court consistent with this Court's determination in Burlington Northern.

CONCLUSION

For the foregoing reasons, Petitioner submits that this Court should grant review in this case to reverse the holding of the Second Circuit to apply the standard enunciated by this Court in Burlington North for determining adverse employment actions retroactively to Petitioner's Title VII case. Petitioner would also ask this Court to remand the case to the District Court to apply the new standard under Title VII to Petitioner's case.

Respectfully submitted,

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Attorneys for Petitioner

**Counsel of Record*

Order of the U.S. Court of Appeals for the Second Circuit Denying Petition for Rehearing, Filed November 29, 2006.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
49 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

UNITED STATES COURT OF APPEALS
FILED
NOV 29 2006
Thomas Asreen, Acting Clerk
SECOND CIRCUIT

Date:	
Docket Number:	05-5374-cv
Short Title:	Johnson v. Potter
DC Docket Number:	04-cv-6634
DC:	WDNY (ROCHESTER)
DC Judge:	Honorable Charles Siragus

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29 day of November two thousand six.

Johnson v. Potter

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant, Roland Johnson. Upon consideration by the panel that decided the

appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: s/_____
Motion Staff Attorney

Summary Order of the United States Court of Appeals for the Second Circuit, Dated and Filed June 7, 2006.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 7th day of June, two thousand-six.

UNITED STATES COURT OF APPEALS
FILED
JUN 07 2006
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

PRESENT:

HON. JON O. NEWMAN,
HON. CHESTER J. STRAUB,
HON. ROBERT A. KATZMANN,
Circuit Judges,

ROLAND JOHNSON,
Plaintiff-Appellant,

SUMMARY ORDER
No. 05-5374-cv

v.

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE,
Defendants-Appellees.

Appearing for Appellant: CHRISTINA ANN AGOLA,
Rochester, NY

Appearing for Appellee:
KATHLEEN M. MEHLTRETTER,
Acting United States Attorney
(Lynn S. Edelman, Assistant United States Attorney, on the brief)
Buffalo, NY

[2]Appeal from the United States District Court for the Western District of New York (Charles J. Siragusa, *Judge*).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is
AFFIRMED.

Johnson appeals from the judgment of the United States District Court for the Western District of New York (Charles J. Siragusa, *Judge*), granting defendant's motion for summary judgment, denying Johnson's motion for a continuance of discovery pursuant to Federal Rule of Civil

Procedure 56(f), and dismissing Johnson's complaint. Upon review of the record and applicable law, the judgment of the District Court is affirmed.

This is Johnson's third suit against the defendant Postmaster General under Title VII of the Civil Rights Act of 1964 ('Title VII'), as amended, 42 U.S.C. § 2000e *et seq.* All three of his suits have been before Judge Siragusa in the District Court. Johnson's first suit was brought in 1990, alleging a denial of promotion on the basis of race. It settled in 1998 following two days of trial. On January 15, 2002, Johnson filed a second suit (*'Johnson II'*) against defendant, alleging that he suffered retaliation for his first suit. Judge Siragusa granted summary judgment to defendant on February 28, 2005, and we affirmed by summary order on December 15, 2005.

While defendant's motion for summary judgment in *Johnson II* was pending, Johnson filed this suit, alleging retaliation and constructive discharge. Judge Siragusa granted defendant's motion for summary judgment in this case on September 16, 2005.

The District Court correctly determined that, in so far as Johnson alleged claims for retaliation that were on could have been raised in *Johnson II*, his claims were barred by res [3] judicata. We agree with the District Court that Johnson's new allegations of retaliation, though not barred by res judicata, were not sufficient to state a *prima facie* case of an "adverse employment action," which is necessary to any claim of retaliation under Title VII. *See Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). We express no opinion as to the District Court's holding that Johnson's constructive discharge claim is in large part barred by collateral estoppel; however, we agree with the District Court's alternative holding that Johnson's allegations, even if taken as true, fall far short of establishing a constructive discharge. Johnson's allegations "do not legally suffice to sustain an inference

that a reasonable person would have been 'compelled' to resign." *See Martin v. Citibank, N.A.*, 762 F.2d 212, 221 (2d Cir. 1985).

"[O]nly in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Trammell v. Keane*, 338 F.3d 155, 161 n.2 (2d Cir. 2003). Nevertheless, we see no abuse of discretion in the District Court's denial of Johnson's motion for a continuance of discovery under Rule 56(f). Johnson had already enjoyed a full opportunity to conduct discovery in *Johnson II*. For the reasons carefully stated by the District Court, we agree that Johnson failed to identify any new facts as to which he needed discovery that might "reasonably [be] expected to raise a genuine issue of material fact." *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004).

For the reasons set forth, we AFFIRM the order of the District Court. [4]

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: s/Richard Alcantara 6/7/06
Richard Alcantara, Deputy Clerk DATE: 6/7/06

FOR THE COURT:
Thomas Asreen, Acting Clerk

by s/Brenda Mijica
Deputy Clerk [4]

Judgment of the United States District Court for the Western District of New York, Dated September 27, 2005.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ROLAND JOHNSON,
Plaintiff,

V. CASE NUMBER: 04-CV-6634

JOHN E. POTTER, Postmaster General, United States Postal Service,
Defendant.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion (#3) for summary judgment is GRANTED, plaintiff's cross-motion (#9) pursuant to Rule 56(f) is DENIED, and the action is dismissed.

September 27, 2005 — DATE

RODNEY C. EARLY — CLERK

(By) s/John H. Folwell
John H. Folwell
Deputy Clerk

Decision and Order of the United States District Court for the Western District of New York, Dated September 16, 2005.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROLAND JOHNSON,

Plaintiff, No. 04-CV-6634 CJS

-vs- DECISION AND ORDER

JOHN E. POTTER, Postmaster General, United States Postal Service,

Defendant.

APPEARANCES

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Rochester, New York 14614

For defendants: Michael A. Battle
United States Attorney for the Western District of New York
Lynn S. Edelman, Esq., of Counsel
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Buffalo, New York 14202

INTRODUCTION

This is an employment discrimination action alleging retaliation and constructive discharge in violation of Title

VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.* Now before the Court is defendant's motion [#3] to dismiss the amended complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6), and alternatively, for summary judgment pursuant to Fed. R. Civ. P. 56, and plaintiff's cross-motion [#9] for leave to conduct discovery [2] pursuant to Fed. R. Civ. P. 56(f). For the reasons that follow, defendant's application for summary judgment is granted, plaintiff's application is denied, and this action is dismissed.

BACKGROUND

This is the third employment discrimination lawsuit which the plaintiff has filed against the United States Postal Service. *See, Johnson v. Henderson*, 90-CV-7138 CJS and *Johnson v. Potter*, 04-CV-6239 CJS. Because they are relevant to the instant case, the Court will set forth the facts of the two previous lawsuits. Plaintiff is an African American male who was hired by the United States Postal Service in Buffalo, New York in 1985. In September 1989, plaintiff filed a complaint with the Postal Service's Equal Employment Opportunities Office, alleging that he had been denied a promotion to the position of "204B Supervisor" because of his race. At that time plaintiff's supervisor was Bill Mitchell ("Mitchell"). According to plaintiff, Mitchell promised plaintiff that he would be given another opportunity for promotion to 204B Supervisor, but later reneged on the promise. Plaintiff subsequently commenced a lawsuit in this Court pursuant to Title VII entitled *Roland C. Johnson, Jr. v. William J. Henderson, Postmaster General, United States Postal Service*, Case No. 90-CV-7138 CJS(F) ("case 90-CV-7138).

Plaintiff continued working at the Postal Service while his lawsuit proceeded. In or about September 1998,

plaintiff was promoted to the position of Claims and Inquiry Clerk, PS-5. At all relevant times thereafter, at the branch where plaintiff worked, there were two other Claims and Inquiry Clerks, Judith Grove ("Grove") and Diana Chandler ("Chandler"). Grove and Chandler held the same job classification as plaintiff, PS-5, but [3] had more seniority than plaintiff. Plaintiff's position was also referred to as "Lost and Found" and "Loose-In-The-Mails" clerk. In that capacity, plaintiff was responsible for handling items inadvertently mailed, dropped into mailboxes, or lost at the post office, such as bank envelopes containing cash and checks, as well as personal property such as purses, wallets, keys, gift certificates, and photographs. Plaintiff stored these items in a locked cabinet in his work area. Plaintiff was the only one of the three Claims & Inquiry Clerks who routinely handled lost and found money. Plaintiff also worked with a Kathy Deneka ("Deneka"), whose title was Complaints and Inquiry Clerk, PS-6. Plaintiff's supervisor was Maryann Molenda ("Molenda").

Plaintiff's lawsuit in case 90-CV-7138 was tried before the undersigned in November 1998. On the third day of the trial, the parties agreed to a complete settlement. In exchange for settling the lawsuit, defendant agreed to pay plaintiff $90,000.00 and restore 496 hours of sick leave. Plaintiff contends that after the lawsuit was settled, his immediate supervisor, Molenda, began to harass him and retaliate against him.

The alleged post-lawsuit harassment began with a disagreement between plaintiff and Molenda over the procedures plaintiff was to use for inventorying and storing certain items of mail. According to plaintiff,

> supervisor Molenda directed me to keep a special 'log' of every single time I went into my overhead cabinet where money and registered mail was kept, in

> addition to the normal log that identified 'Matters Without Address Found in the Mails' that I was required to keep. No other postal employee under Molenda's supervision was subject to this treatment; indeed, my predecessor Lester Morris was only required to maintain the 'Matters Without Address Found in Mails' log.

Johnson Aff., 04-CV-6239 [#45] ¶ ¶ 37-38. While plaintiff refers to "no other postal [4] employee being subject to such treatment," as indicated above, he was the only employee who routinely handled lost and found money. Plaintiff's specific objection was that his predecessor had not been required to keep such a log. Molenda described the event differently, stating that plaintiff

> was off from work for approximately 3 days during the early portion of November 1998. When he returned he stated his top drawer was opened and that he remembers locking it when he left. He mentioned that there are only two sets of keys; one he has and one I have. He requested I sign off that he is not responsible for missing items. I denied his request and he filed a grievance where an agreement was reached.

Id. , Ex. W. Molenda made no reference to plaintiff having to keep a special "log." The agreement referred to by Molenda, reached between the Postal Service and plaintiff's union, provided, in relevant part:

> Management agrees to implement the following actions:
>
> 1) Clerk will deposit all monies on a daily basis.

> 2) Management will establish a inventory log, for all loose in the mail items kept under lock and key. Clerk will annotate on the inventory log final disposition of all items.
>
> 3) Manager, Consumer Affairs will arrange to have locks changed on drawers and cabinets.
>
> 4) Grievant's supervisor will maintain duplicate key. Whenever duplicate key is issued, the Mgr CA will record the individual name, time/date, and return time/date.

Id., Ex. E. Notably, while plaintiff claimed that he filed the grievance in response to Molenda requiring *him* to establish a log, the subsequent agreement required the postal service to "establish" such a log, and defendant maintains that plaintiff was only required to keep the log as the result of this agreement.

In May 1999, Karl Anderson ("Anderson"), one of plaintiff's supervisors, [5] commented that plaintiff's work area was "the dark side of the room." Plaintiff insists that this was a racial slur, although Anderson maintains that he was making a joke based upon the movie "Star Wars." In papers submitted in connection with a summary judgment motion, plaintiff suggested that Anderson's comment was racially motivated because plaintiff and another black employee were the only African-Americans on the side of the room to which Anderson was referring. However, in a deposition, plaintiff testified that there were African Americans stationed on both sides of the room when Anderson made his remark.

On or about May 27, 1999, plaintiff and his union representative met with the Postal Service's District Manager, Nicholas Fabozzi ("Fabozzi"), to discuss the alleged harassment by Molenda and the "dark side"

comment by Anderson. Plaintiff alleges that during the meeting, Fabozzi stated that he "used to participate in the telling of racial jokes" and that it had been "no problem."

On or about December 2, 1999, Molenda left a post-it note on plaintiff's telephone, directing him to forward calls when he was away from his desk. Plaintiff contends that he was singled out in this regard, and that Molenda did not tell other employees to forward their calls until after he complained of disparate treatment. Molenda, however, maintains that she left similar notes on all of her employees' phones at different times.

In January 2000, plaintiff claims that he overheard Grove and Deneka having a conversation in which they made comments which, although not about him, he found racially-offensive. Plaintiff states that "they were speaking about 'blacks not wanting to work and standing on the corner selling drugs and stuff.'" Plaintiff reported the incident to [6] Molenda, who responded by issuing a memo that stated:

> It has come to my attention that employee(s) are using profane or obscene language in the office. This type of behavior will not be tolerated by management. This language is offensive to others. We must keep in mind that this office is a customer service officer, where at no given time [sic], customers are in our office or on the telephone who may also hear this type of language. This also relates to conversations amongst one another (when other can hear you) that may be offensive to others. Our workplace is a professional place of business and we must conduct ourselves in this manner. Thank you for your cooperation.

Pl. Supp. Appendix, 04-CV-6239 [#80], Ex. L. Although this memo was addressed to all of the employees in the

office, and was sent to address plaintiff's complaint, plaintiff insists that the memo singled him out to be reprimanded in retaliation for having complained.

On or about February 16, 2000, Molenda told plaintiff to "drop everything" and handle claims while she and Deneka "had a personal conversation over coffee in her office." On or about March 6, 2000, plaintiff and his union representative again met with Fabozzi to complain about what plaintiff viewed as a continuing pattern of harassment by Molenda, as well as her preferential treatment of Deneka. During the conversation, Fabozzi again referred to his having told racial jokes in the past. Plaintiff asked that Molenda be required to attend "sensitivity training," but Fabozzi dismissed the idea.

On or about August 18, 2000, Molenda called a unit meeting and announced that she was taking duties that had been performed by the Claims and Inquiry department in Rochester, and was adding them to the Buffalo Claims & Inquiry department. Molenda, in her affidavit submitted in connection with the EEO investigation, described the situation as follows:

> I also had 2 Claims & Inquiry clerk positions in Rochester. Due to [7] technology, the workload diminished and those 2 positions were abolished. An 800 line was put in for Rochester customers to call and that line is on all 3 level 5 Claims & Inquiry clerks phones in Buffalo, not just Roland's. A light blinks when there is a call and the first to pick it up takes the call. If no one answers, it rolls over to Claims & Inquiry Clerk Bill Maturski's voice mail. The line is not on the level 6's phone (Kathy Deneka's) since the intent of the line was to assist customers in Rochester with Claims & Inquiry (level 5 positions).

Pl. Appendix to Local Rule 56.1 Counterstatement 04-CV-6239 [#71], Ex. T. Plaintiff initially alleged that Molenda used the occasion to retaliate against him by assigning additional duties only to him. However, he later admitted that the other PS-5 Claims and Inquiry Clerks were also given additional duties similar to the ones he was given. Nonetheless, plaintiff continued to claim that Deneka, was treated preferentially because she did not receive any additional PS-5 work, even though she was a PS-6 clerk.

Plaintiff also claimed he told Molenda that he was overwhelmed with work and asked for her help, but she refused. According to plaintiff, Molenda said that, if anything, she would consider creating an additional position for someone to assist Deneka in her work.

On August 25, 2000, plaintiff filed another EEO charge. In the EEO complaint, plaintiff described an incident on August 18, 2000, as follows:

> I was 'combatively' approached by Consumer Affairs Manager Maryann Molenda. She remarked, 'I need to review the way you are doing things, especially the way you handle the money.' This overt racist statement has numerous + frequent [sic] since Sept. 1998.

Pl. Appendix to Local Rule 56.1 Counterstatement of Facts, 04-CV-6239 [#71], Exhibits I & U. However, plaintiff subsequently gave a different version of those events:

> Immediately *after* Plaintiff filed his August 25, EEO charge, Molenda aggressively approached Plaintiff in front of others and remarked 'I want to review the way you are doing things, *the way you are doing them is* [8] *probably wrong*.' (Exhibit A, p. 107, Lines 20-23).

Johnson Aff., 04-CV-6239 [#66] ¶ 70.

Plaintiff alleged that Molenda subsequently had him bring trays of mail to her for inspection, and kept lists of his tasks, but did not do so for other employees. Plaintiff also claimed that Molenda continued to scrutinize his handling of money. Plaintiff further maintained that Molenda then made a list of his activities, and gave it to the union as proof that plaintiff "did not have enough work to do." On August 30, 2000, Molenda directed that certain work which plaintiff had been performing be performed by another unit known as the "Nixie Unit." On October 11, 2000, Molenda directed the Nixie Unit not to send trays of mail to plaintiff, purportedly to avoid double handling. Molenda also told plaintiff not to continue his usual practice of retrieving mail from the Nixie Unit for processing, because she would get it herself. According to Molenda,

> everyone's work was monitored, tallied, counted and recorded, not just Roland's. This was done primarily because of the changes that occurred in Claims & Inquiry workload being done electronically in addition to other changes that HQ made nationally that affected Claims & Inquiry workload. With the ["]loose in the mails[“] which Roland works on, I wanted to see what Nixie [Unit] rewrap was giving him. [Nixie Unit has] been know to use us as a dumping ground. I have done this practice with the previous claims and inquiry clerk who now is retired. As a manager, the above monitoring should occur to know the workload and to correct any deficiencies found.

Pl. Appendix to Local Rule 56.1 Counterstatement 04-CV-6239 [#71] Ex. T. Plaintiff, however, claimed that Molenda

was scrutinizing his work in order to harass him, and in order to decrease his workload so that she could justify eliminating his position.

In February 2001, Molenda sent a letter to the president of plaintiff's labor union and to the Postal Service's labor relations specialist, notifying them that she intended to [9] eliminate plaintiff's PS-5 position and create a new PS-6 position. Molenda's letter stated:

> This letter is to officially notify you, as outlined in Article 37 of the National Agreement, that position 2336157, Claims & Inquiry Clerk, currently held by Roland Johnson, is under consideration to be rescinded and to post a Complaints & Inquiry Clerk position, level 6. The workload for Claims & Inquiry Clerks [PS-5] will continue to decrease and the workload impacted by the following events:
>
> > In Fall of 2000, signature capture (electronic filing) took place. This sharply reduced the workload for Claims & Inquiry eliminating the manual filing and the manual lookups for accountable mail.
> >
> > Because of the electronic filing of accountable mail, filing claims is conducted in a shorter time frame.
> >
> > Effective September 1999, the Postal Inspection Service changed the procedures in handling PS Form 1510 (mail loss/rifling report) which sharply reduced the workload for Claims & Inquiry.
> >
> > A decrease in claims being processed took effect in 1997 because of local adjudication

> with unnumbered claims. Streamlining efforts on overall claims process is under review by Headquarters.
>
> The National Call Centers that are in place and their continued national roll out will impact the number of calls.
>
> Headquarters is currently identifying process improvements for handling loose in the mail items at the point of discovery. A finished product should be seen sometime in Spring.
>
> The workload for *Complaints* & Inquiry [PS-6] has steadily increased. Customers have additional means in contacting us with their service issues th[a]n just by telephone or in writing. Service issues are also received electronically through the National Call Centers and the Internet. A review of the workload by the Claims & Inquiry Clerks and Complaints & Inquiry Clerk has been conducted and warrants this decision. I am asking for your input by February 21, 2001.

Molenda Aff., 04-CV-6239 [#79] Ex. A (emphasis added). There is no indication in the [10] record that the union responded to this letter. On or about February 14, 2001, Molenda told plaintiff that she was going to eliminate his position, and create a new Complaints and Inquiry Clerk position as a PS-6 position, for the purpose of assisting Deneka. On March 7, 2001, Molenda notified the union that she was going to "revert" plaintiff's position and post a new PS-6 position. Plaintiff complained that plaintiff was singling him out for retaliation. In response to that charge, Molenda told the EEO that

> Roland is taking this personally. It is not HIS position I want to eliminate. I observed that there was not enough work for 3 level 5 Claims & Inquiry clerks, however, there was enough workload for another Complaints & Inquiry Clerk position. This occurred because of workload and volume that I conducted [sic] for several months when changes began in Claims & Inquiry workload due to HQ changes made nationally. While it is true, that because Roland is the junior employee, it will be the position he occupies, but the reason for that is contractual, not personal, based on unit seniority.

Pl. Appendix to Local Rule 56.1 Counterstatement, 04-CV-6239 [#71] Ex. T. Plaintiff claimed that Molenda's proposal violated the collective bargaining agreement between the union and the postal service. However, the union did not support him in that regard. Plaintiff subsequently filed complaints with both the union and the Merit System Protection Board. On April 30, 2001, the postal service advised plaintiff that it was "rescinding" its attempt to eliminate the position at the time, but would review the matter in six months.

On May 21, 2001 plaintiff filed another EEO complaint. This time he alleged retaliation by Molenda.

On July 23, 2001, plaintiff claimed that someone sabotaged his telephone by placing a sticky glue-like substance on it. Plaintiff had no idea what was on the phone or how it came to be there. In response, the postal service replaced the phone. At around [11] this same time, all the members of plaintiff's work unit were assigned new telephone extension numbers. Plaintiff alleged that his co-workers received their new numbers before him, although he could not say how long he had to wait for his number. He also claimed that after he was assigned a new telephone number, he received fewer phone calls.

On August 15, 2001, Molenda went on leave and appointed Deneka to handle certain tasks while she was away, such as collecting leave slips. On August 17, 2001, plaintiff gave a leave slip to Deneka. Plaintiff's request was apparently not transmitted to the appropriate person, and as a result, he lost 2 hours of pay. However, he was reimbursed for the error.

On October 19, 2001, the EEO issue a final order dismissing all of plaintiff's claims of harassment and retaliation.

In November 2001, the lock on plaintiff's desk drawer became stripped. Plaintiff complained that this was an act of vandalism, although he had no idea nor any proof as to how the damage occurred. Plaintiff stated that he never checked to see if anything had been taken from the drawer. On or about December 10, 2001, someone placed a note saying "keep out" on plaintiff's work cubicle.

In January 2002, plaintiff commenced his second lawsuit, *Johnson v. Potter*, 02-CV-6025, which was later re-numbered as case number 04-CV 6239 ("case 04-CV-6239"). In that case, plaintiff alleged that the foregoing instances of alleged mistreatment constituted retaliation under Title VII.

On or about November 29, 2002, the office Marketing Manager, Laura Lewis ("Lewis"), promoted Deneka to the position of Customer Service Representative, EAS-[12]13. Plaintiff claimed that Deneka's promotion was retaliatory, since he was never notified of the opening, and since Deneka's promotion made his job less secure. However, plaintiff subsequently admitted that he had been out of work on sick leave when Deneka was promoted, and did not know whether or not the position had been posted. Plaintiff also did not explain how Deneka's promotion made his position less secure. On the other hand, defendant submitted proof that the position had been posted and that as a result of the posting, six individuals applied for the

position.

At some point between March 2002 and February 14, 2003, plaintiff made a claim under the Family Medical Leave Act ("FMLA"). According to plaintiff, he was required to submit "excessive documentation" in support of his FMLA claim. Nonetheless, plaintiff's FMLA leave request was apparently granted.

On February 18, 2003, plaintiff's pay check was short by $115. After notifying his supervisors of the error, plaintiff was reimbursed the $115 a few days later. Although plaintiff claimed the shorting of his pay was intentional, he admitted that he had no proof to support his theory.

On April 8, 2003, plaintiff filed an Amended Complaint [#20], which served as the operative complaint throughout the remainder of case number 04-CV-6239. The complaint alleged "an ongoing pattern of retaliation."[1]

On April 21, 2003, plaintiff filed an EEO complaint regarding the FMLA claim, the one-day pay shortage, and Deneka's promotion.

On or about April 24, 2003, plaintiff wrote a letter to Lewis accusing her of [13] sexually harassing him. Lewis asked plaintiff to discuss the letter, but plaintiff refused. Sometime after that, Lewis confronted plaintiff and said, "why don't you be a man and talk about the letter." Lewis further stated that plaintiff's problem was that he was "seeing dollar signs," and that "it wasn't going to happen off her career." Lewis further said that "she was aware that Plaintiff was afraid of losing his job, but that if anyone were to be fired, he would be the first to go." Although plaintiff characterizes this last statement as a retaliatory threat, he admits that he was the least senior of the Complaint and Inquiry Clerks, and that if "any of the three Claims and

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1 *Id.* at ¶ 168

Inquiry positions need[ed] to be abolished...[he] would be the next person in line to be terminated because of [his] lack of seniority."[2]

Plaintiff left work on sick leave in May 2003, and never returned. Plaintiff resigned his position on August 15, 2003. On September 5, 2003, plaintiff filed a request for EEO "pre-complaint counseling," alleging that he had been constructively discharged. Plaintiff stated that his alleged constructive discharge "comes after persistent management harassment and a 8/13/03 + 8/14/03 revelation that an 'involuntary deduction' of $6,808.00 by the agency to pay my creditors during a 1998 civil trial, has not been paid."

In May 2004, some nine months after plaintiff claims that he was constructively discharged, plaintiff moved before this Court for leave to file a second amended complaint in case 04-CV-6239. The proposed second amended complaint contained a claim for constructive discharge, and also included allegations of retaliation by Lewis [14] concerning her comments to him in April 2003. The Court denied the application to amend, finding that plaintiff failed to demonstrate good cause for his delay in failing to move to amend the complaint beyond the deadline set by the Court.

After having a full opportunity to conduct discovery, the parties each subsequently moved for summary judgment in case 04-CV-6239. By Decision and Order [#83] filed on March 2, 2005, the Court denied plaintiff's application for summary judgment, granted defendant's application, and dismissed the action. In connection with those cross motions, it was undisputed that plaintiff had engaged in protected activity. However, defendant asserted that none of the alleged acts of retaliation amounted to an "adverse employment action"

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2 *See*, 04-CV-6634, Amended Complaint [#2], ¶ ¶ 164-65.

under Title VII. Plaintiff, relying on the Second Circuit's decision in *Richardson v. New York State Dep't of Correctional Servs.*, 180 F.3d 426, 436 (2d Cir. 1999), argued that the adverse employment action consisted of "unchecked retaliatory co-worker harassment." Plaintiff alternatively asserted that the alleged retaliatory acts by Molenda constituted adverse employment actions. The Court rejected the "unchecked retaliatory co-worker harassment" theory, finding that plaintiff had failed to come forward with evidence that the alleged harassment by co-workers was either retaliatory or unchecked. The Court also found that defendant was entitled to judgment regarding the alleged retaliation by Molenda, in some instances because plaintiff had failed to demonstrate a prima facie case, and in other instances because plaintiff failed to come forward with evidentiary proof, establishing that the defendant's proffered reasons were false or pretextual. The Court's summary judgment decision in case number 04-CV-6239 addressed all of the alleged acts of retaliation discussed above, except for the two which plaintiff did not assert in that case: 1) the claim that plaintiff was [15] required to submit excessive documentation in support of his FMLA claim; and 2) the claim that Lewis retaliated against plaintiff in April 2003 by threatening his job.

While the summary judgment motions were pending in case number 04-CV-6239, plaintiff filed the subject action on December 29, 2004. The complaint in this action sets forth the allegations of retaliation involving the FMLA claim and the alleged threats by Lewis, along with all of the allegations of retaliation involving the FMLA claim and the alleged threats by Lewis, along with all of the allegations of retaliation that were raised in case number 04-CV-6239. Based upon the allegations, plaintiff asserts two causes of action: retaliation and constructive discharge. Amended Complaint [#2] ¶ ¶ 179-87. With regard to the retaliation

claim, the complaint states, in relevant part:

> Plaintiff engaged in protected activity when he made both informal and formal EEO complaints on March 19, 2003, April 21, 2003, May 15, 2003, [and] June 12, 2003. Shortly thereafter, he was subject to adverse employment action, including threats to terminate his position, falsifying his time card,[3] and ultimately, his constructive discharge in retaliation for having engaged in said protected activity.

Amended Complaint [#2], ¶ 180. Based upon the dates contained in the paragraph above, the retaliation claim is based solely upon alleged adverse employment actions occurring on and after March 19, 2003. The constructive discharge claim, on the other hand, is based upon all of the instances of alleged retaliation discussed above, including those occurring prior to March 19, 2003. In other words, with the exception of the FMLA incident and the alleged harassment by Lewis, the constructive discharge claim how before the Court is based on the same alleged acts of retaliation which the Court dismissed in case number 04-CV-6239. [16]

Prior to conducting any discovery in this action, defendant filed the subject motion seeking dismissal and/or summary judgment. Defendant contends that the retaliation claim must be dismissed for several reasons. First, defendant contends that the acts of alleged retaliation are barred by collateral estoppel, except for two, the FMLA incident and the alleged threats by Lewis. And, as to those two incidents, defendant contends that plaintiff

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3 The alleged falsification of plaintiff's time card actually occurred in February 2003. See Amended Complaint[#2] ¶ ¶ 123, 167, 169.

failed to establish a prima facie case of retaliation, since plaintiff suffered no adverse employment action. Defendant further notes that the FMLA incident is not retaliatory for two additional reasons: first, the FMLA incident pre-dated the protected activity alleged by plaintiff, and second, there is no evidence that the employee who supposedly requested "excessive documentation" from plaintiff was even aware of plaintiff's protected activity. Defendant also contends that the constructive discharge claim should be dismissed for several reasons. First, defendant contends that, since the incidents which plaintiff relies on in support of his constructive discharge claim are the same incidents of alleged retaliation that the Court already dismissed, the constructive discharge claim is barred by collateral estoppel. More specifically, defendant contends that since the incidents of alleged retaliation did not amount to "adverse employment actions," they necessarily fall short of establishing the aggravated circumstances required to establish a constructive discharge. Alternatively, defendant contends that in any event, the acts of alleged retaliation upon which the constructive discharge claim is based fail, as a matter of law, to establish a constructive discharge. Lastly, defendant argued that the constructive discharge claim had not been timely filed with the EEOC, and also had not been administratively exhausted.

In response to defendant's motion, plaintiff has filed an application under Rule [17] 56(f). Plaintiff states that he needs to conduct discovery before responding to defendant's motion, primarily so that he can establish that his constructive discharge claim was both timely filed with the EEOC and administratively exhausted. Plaintiff also requests leave to obtain discovery from his own doctors, so that he can establish that it was medically necessary for him to resign from his position.

Defendant subsequently filed a reply, in which he

concedes, for purposes of the subject motions, that plaintiff's constructive discharge claim was both timely and administratively exhausted. Defendant maintains, however, that plaintiff is not entitled to discovery, and that the case should be dismissed.

On August 18, 2005, counsel for the parties appeared before the undersigned for oral argument of the subject motions. Notably, during oral argument, plaintiff's counsel argued that acts which fail to rise to the level of "adverse employment actions" under Title VII may nonetheless establish a constructive discharge. Following oral argument the Court permitted plaintiff's counsel to supplement her brief on that issue of law. The Court has now thoroughly considered the parties' submissions and the arguments of counsel.

STANDARDS OF LAW

Rule 56

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions to file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment [18] bears the burden of establishing that no genuine issue of material fact exists. *See, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisified." 11 Moore's Federal Practice, §56.11[1][a] (Matthew Bender 3d ed.). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by

pointing to an absence of evidence to support an essential element of the nonmoving party's claim." *Gummo v. Village of Depew*, 75 F.3d 98, 107 (2d Cir. 1996) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)), *cert denied*, 517 U.S. 1190 (1996). Once that burden has been established, the burden then shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To carry this burden, the non-moving party must present evidence sufficient to support a jury verdict in its favor. *Anderson*, 477 U.S. at 249. The parties may only carry their respective burdens by producing evidentiary proof in admissible form. Fed. R. Civ. P. 56(e). The underlying facts contained in affidavits, attached exhibits, and depositions, must be viewed in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993).

When a party is unable to produce affidavits in opposition to a summary judgment [19] motion, she may make an application pursuant to Rule 56(f), which states:

> When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). In this Circuit, the requirements for

obtaining relief under Rule 56(f) are as follows:

> [A] party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing '(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts.

Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 303 (2d Cir. 2003) (citations omitted).

A district court's decision to deny a request for additional discovery under Rule 56(f) is reviewed on appeal using the "abuse of discretion" standard. *Gualandi v. Adams*, 385 F.3d 236, 244-245 (2d Cir. 2004). However, in this regard, it is clear that as a general rule, summary judgment is strongly disfavored where the non-moving party has had no opportunity to conduct discovery. *Trammell v. Keane*, 338 F.3d 155, 161 (2d Cir. 2003) ("[O]nly in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.") (*quoting Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); *see also*, *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002) ("If the non-movant makes a proper and timely showing of a need for [20] discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion.").

Title VII

"Title VII makes it unlawful for an employer to discriminate against any individual with respect to the 'compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.'" *Richardson v. New York State Department of Correctional Services*, 180 F.3d 426, 436 (2d Cir. 1999) (citations omitted). However, "Title VII does not establish a 'general civilty code' for the American workplace. Simple teasing, offhand comments, or isolated incidents of offensive conduct (unless extremely serious) will not support a claim of discriminatory harassment." *Petrosino v. Bell Atlantic*, 385 F.3d 210, 223 (2d Cir. 2004) (citation omitted).

Title VII Retaliation

To establish a prima facie case of retaliation under Title VII, "a plaintiff must demonstrate participation in protected activity known to the defendant, an employment action disadvantaging the person engaged in the protected activity, and a casual connection between the protected activity and the adverse employment action." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000) (citations and internal quotations omitted). Making a complaint regarding harassment to one's supervisor is "protected activity" under Title VII. *Id.*

To make a prima facie showing of an adverse employment action, the plaintiff must show that the employer's actions caused a materially adverse change in the terms and conditions of employment. *Valentine v. Standard & Poors,* 50 F.Supp.2d 262, 283 [21] (S.D.N.Y. 1999), *aff'd*, 205 F.3d 1327 (2d Cir. 2000). Things such as "negative evaluations alone, without any accompanying adverse result, are not cognizable." *Id.* It is well settled that

> [t]o be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation.

Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (Citations and internal quotations omitted). There is no "bright-line rule" for identifying an adverse employment action, rather, "courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse.'" *Richardson*, 180 F.3d at 446.

Title VII Constructive Discharge

The elements of a claim for constructive discharge are as follows:

> A constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. In determining whether or not a constructive discharge has taken place, the trier of fact must be satisfied that the working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.

Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (Citations and internal quotation marks omitted).

However,

> [a] constructive discharge generally cannot be established...simply through evidence that an employee was dissatisfied with the nature of his assignments...Nor is it sufficient that the employee feels that the quality of his work has been unfairly criticized...Nor is the standard for constructive discharge merely whether the employee's working conditions [22] were difficult or unpleasant.

Stetson v. NYNEX Service Co., 995 F.2d 355, 360-361 (2d Cir. 1993) (citations and internal quotation marks omitted). Instead, the plaintiff "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 2347 (2004).

Title VII discrimination and retaliation claims are analyzed under the three-tier burden-shifting test "set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and its progeny." *Valentine v. Standard & Poors*, 50 F.Supp2d at 281-82 (S.D.N.Y. 1999) (Citations and internal quotations omitted). Under the first tier of the *McDonnell Douglas* test, the plaintiff must establish a prima facie case. If the plaintiff establishes his prima facie case[4], the burden shifts to the employer to articulate some legitimate, nondiscriminatory

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4 It is clear that "the burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the prima facie stage is *de minimis*." *Chambers v. TRM Copy Centers Corp.* 43 F.3d 29, 37 (2d Cir. 1994) (emphasis in original, citation and internal quotation marks omitted).

reason for the employee's discharge. At this stage, the employer need only articulate –but need not prove -- the existence of a nondiscriminatory reason for its decision. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Once defendant meets its burden of production, the burden shifts back to plaintiff. Under the third tier of the *McDonnell Douglas* test, plaintiff bears the ultimate burden of proving that the reason proffered by the employer is a pretext for unlawful discrimination. In order to survive a motion for summary judgment, plaintiff must establish a genuine issue of material fact as to whether the employer's reason for discharging her is false and as to whether it si more likely that a discriminatory reason motivated the employer to make the adverse employment decision.

Valentine, 50 F.Supp.2d at 281-82 (Citations and internal quotations omitted).

[23] Courts must be "particularly cautious about granting summary judgment to an employer in a discrimination case when the employer's intent is in question. Because direct evidence of an employer's discriminatory intent will rarely be found, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997)(Citations and internal quotations omitted). However, a plaintiff may not defeat a motion for summary judgment merely by relying upon "purely conclusory allegations of discrimination, absent any concrete particulars." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985), *cert. den.* 474 U.S. 829.

ANALYSIS

Applying the foregoing principles of law to the facts of this case, the Court finds, at the outset, that plaintiff's cross-motion under Rule 56(f) should be denied. The Court is mindful that, as discussed above, a Rule 56(f) application should ordinarily be granted where the plaintiff has conducted no discovery. *See, e.g., Czerw v. Ronald Billitier Elec., Inc.*, 03-CV-6613 (CJS) & 03-CV-6614 CJS, 2005 WL 1159425 at *8 (W.D.N.Y. May 17, 2005) (Siragusa, J.) ("[A] grant of summary judgment before any discovery has been conducted would be inappropriate, since palintiff has not had a fair opportunity to show that defendants' articulated reasons are pretextual."). However, the instant case is unusual in that plaintiff already had a full opportunity to conduct discovery in the prior proceeding between these parties involving essentially the same claims. *Sty-Lite Co. v. Eminent Sportswear Inc.*, No. 01 Civ. 3320 (CBM), 2002 WL 15650 at *5 (S.D.N.Y. Jan. 7, 2002) ("[A]lthough it is technically true that no discovery has taken place in the *present* incarnation of this case, [plaintiff] had ample opportunity to conduct full [24] discovery in the identical *prior action*.") (emphasis in original). In fact, the parties were conducting discovery in case number 04-CV-6239 as late as August 2003, and plaintiff was deposed by defendant on August 14, 2003, the day before plaintiff resigned his position. Accordingly, the Court does not view this case as one in which plaintiff has had no opportunity to conduct discovery, but on the contrary, views it as a case where plaintiff has already had a full opportunity to do so. Nor does the Court believe that the additional discovery which plaintiff seeks would be helpful. Most notably, the discovery that plaintiff wants to obtain largely pertains to the timeliness of his constructive discharge claim, and to the administrative exhaustion of that claim. However, that discovery is unnecessary, since as discussed above,

defendant concedes, for purposes of this motion, that the claim is both timely and administratively exhausted. As for the "discovery" that plaintiff wants to obtain from his own doctors, the Court sees no reason why plaintiff could not have obtained such evidence already, since, in addition to being available to him directly through the doctors, the information that he references is also part of the administrative record in his social security disability case. In any event, that information, purportedly detailing plaintiff's subjective reactions to the alleged harassment, would be irrelevant, since the standard to be applied in a constructive discharge case is an objective one. For all of these reasons, plaintiff's cross-motion under Rule 56(f) is denied. Plaintiff's alternative request for additional time to respond to the summary judgment motion, in the event that the Court rejected his Rule 56(f) application, is also denied. *See, Players, Inc. v. City of New York*, 371 F.Supp.2d 522, 534 (S.D.N.Y. 2005) (discussing reasons why a plaintiff whose Rule 56(f) application fails is not necessarily entitled to an additional opportunity to oppose the summary [25] judgment motion). Plaintiff made a tactical decision to proceed in the manner that he did in this case, and the Court declines to extend the briefing schedule. *See, Id.*

Next, turning to the merits of defendant's summary judgment motion, the Court finds that defendant is entitled to summary judgment on plaintiff's retaliation claims. The Court previously granted summary judgment to defendant on all of the very same claims of retaliation alleged here except for two, the FMLA incident and the alleged threats by Lewis. Moreover, as to the FMLA claim, plaintiff had an opportunity to include that claim in the previous action, but chose not to do so. Specifically, plaintiff was obviously aware of the FMLA incident at the time he amended his complaint in case number 02-CV-6239 on April 8, 2003. Consequently, that claim, as well as all of the claims of

retaliation that the Court specifically addressed in the prior action are barred by res judicata. *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 284-285 (2d Cir. 2000) ("The doctrine of res judicata, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

Even assuming, however, that the FMLA claim were not barred by res judicata, defendant would still be entitled to summary judgment. Plaintiff has not established a prima facie case of retaliation concerning the FMLA incident for at least two reasons. First, plaintiff suffered no adverse employment action, but rather, he claims only that he was required to submit what he viewed as "excessive documentation" in support of his FMLA claim. Second, plaintiff has come forward with no evidence to refute the affidavit of the FMLA claim administrator, who states that he was unaware of plaintiff's protected activity.

[26] Similarly, plaintiff has failed to demonstrate a prima facie case of retaliation concerning the alleged threats by Lewis. Specifically, even accepting that Lewis told plaintiff to "be a man," that she told him he was "seeing dollar signs," and that she threatened him by telling him that "if anyone was fired, he would be the first to go," these incidents do not establish an adverse eployment action, either separately or together. Plaintiff does not claim to have suffered any concrete injury. Even assuming, arguendo, that the most serious allegation, Lewis's alleged threat, met the low threshold for a prima facie showing, defendant came forward with a legitimate non-discriminatory reason for Lewis' comment about plaintiff being "the first to go," which is that he was the PS-5 clerk with the least seniority. Moreover, defendant has presented evidence that the elimination of plaintiff's position, even though it never occurred, was warranted for legitimate business reasons. Namely, the PS-5 clerks had too little

work to do, and the PS-6 clerk had too much. Plaintiff has not come forward with any evidentiary proof in admissible form to the contrary. Accordingly, defendant is entitled to summary judgment on plaintiff's retaliation claims.

The Court will now consider plaintiff's constructive discharge claim. The Court finds that where, as here, a plaintiff is claiming that he was constructively discharged based upon acts of retaliation,[5] the acts complained of must actually constitute retaliation under Title VII. In *Suders*, the Supreme Court dealt with "one subset of Title VII constructive discharge claims: constructive discharge resulting from sexual [27] harassment, or "hostile work environment." *Pennsylvania State Police v. Suders*, 124 S.Ct. at 2352. The Supreme Court further noted that, "[c]reation of a hostile work environment is a necessary predicate to a hostile-environment constructive discharge case." *Id.* at 2356. Presumably then, when dealing with a claim for constructive discharge resulting from retaliation, actual retaliation is a necessary predicate. *See, Downey v. Issac*, 622 F.Supp. 1125, 1133 (D.D.C. 1985) ("In sum, in a retaliatory constructive discharge case, a *plaintiff must show that he/she was retaliated against* because of his/her E.E.O. activity and that retaliation constituted intolerable working conditions in which a reasonable person in similar circumstances would have felt compelled to resign.") (emphasis added), *aff'd without opinion* 794 F.2d 753 (D.C. Cir. 1986); *Delashmutt v. Wis-Pak Plastics, Inc.*, 990

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5 *See,* Amended Complaint [#2] ¶ 4 (Plaintiff alleged that he was "subject to an ongoing pattern of retaliation between March 2002 through February 14, 2003 which then culminated in his constructive discharge on August 14, 2003.") Plaintiff has never asserted in his lawsuits before this Court that he was subjected to a hostile work environment.

F.Supp. 689, 697 (N.D. Iowa 1998) (Stating, regarding "constructive discharge as the result of retaliatory conduct," that "if [a plaintiff] cannot prove retaliation, because she cannot prove any adverse employment action, then she necessarily cannot prove her employer made her working environment so intolerable as to establish any independent constructive discharge claim.") (emphasis added); *Amato v. Package Machinery Co.*, Civ. A. No. 81-0380 F, 1987 WL 7238 at *13 (D. Mass. Mar. 2, 1987) ("In analyzing a claim of retaliatory constructive discharge, plaintiff must show she was indeed retaliated against for asserting her rights under Title VII and that retaliation constituted intolerable work conditions leading to the alleged constructive discharge. Because the Court concludes plaintiff has failed to carry her burden of persuasion on the retaliation element, her constructive discharge claim must be denied.") (citation omitted). Consequently, since the Court has already determined, [28] both in the prior case[6] and in the instant case, that the actions complained of fail to establish actionable retaliation, plaintiff's constructive discharge claim based on retaliation must also fail. Moreover, even if a reviewing court were to disagree that the dismissal of plaintiff's retaliation claims *necessarily* requires the dismissal of his retaliatory constructive discharge claim, this Court would alternatively find that the acts alleged by plaintiff fail to establish a constructive discharge as a matter of law.[7] *Martin v.*

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6 The Court agrees with defendant that the dismissal of the retaliation claims in the prior case has collateral estoppel effect in this case.

7 For example, as discussed above at page 13, it appears from the timing of plaintiff's purported

(continued...)

Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985).

CONCLUSION

Defendant's motion [#3] for summary judgment is GRANTED, plaintiff's cross-motion [#9] pursuant to Rule 56(f) is DENIED, and this action is DISMISSED.

SO ORDERED.

Dated: Rochester, New York
September 16, 2005

ENTER:
/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge [28]

(...continued)

constructive discharge that the "last straw" that actually caused him to resign was not any of the alleged retaliation set forth above, but instead, was his belief that defendant had failed to pay his judgment creditors in connection with the settlement of his first lawsuit against defendant. That allegation is not part of this case, and it is the Court's understanding that plaintiff's belief in that regard was later shown to be mistaken.

Petition for Rehearing *En Banc*, Undated.

05-5374-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROLAND JOHNSON,
Plaintiff-Appellant,

– v. –

JOHN E. POTTER, Postmaster General,
United States Postal Service,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING *EN BANC*

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PETITION FOR REHEARING EN BANC

Roland Johnson respectfully petitions the Court for rehearing en banc pursuant to FRAP 40.

STATEMENT PURSUANT TO FRAP 35

This case, decided on June 7, 2006, involves an important issue which has been recently addressed by the United States Supreme Court in Burlington North & Santa Fe Railway Co. v. White, No. 05-259, on June 22, 2006.

In Burlington, the Supreme Court unanimously broadened the definition of retaliation under Title VII of the Civil Rights Act of 1964 to include not only actions that are related to employment or occur at the workplace, but to include all actions that are "materially adverse to a reasonably employee or job applicant." In so deciding, the Supreme Court rejected the pre-existing legal standard that an act relate to the terms and conditions of employment, stating that Title VII "prohibits any adverse treatment that is based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."

The Court's decision in the instant matter was *based* on this pre-existing legal standard, namely that "[a] plaintiff sustains an adverse employment action if he or she endures a "materially adverse change" in the *terms and conditions of* [2] *employment.*" (Page 3, Lines 3-4, of the June 7, 2006 Summary Order, citing Galabya v. New York City Board of Education, 202 F.3d 636; 2000 U.S. App. LEXIS 1603; 82 Fair Empl. Prac. Cas. (BNA) 196; 77 Empl. Prac. Dec. (CCH) P46, 306 (emphasis added).

Roland Johnson respectfully requests a rehearing en banc for full hearing regarding the issue of whether he was subject to an adverse action in accordance with the new legal standard established by the United States Supreme Court in Burlington, i.e., whether he was subject to actions

that are "materially adverse to a reasonable employee or job applicant."

The issue of whether an act constitutes an adverse employment action under the standard set forth in Burlington has not yet been decided by the Second Circuit.

I. RECENT JUNE 22, 2006 SUPREME COURT DECISION EXPANDS EMPLOYEE'S PROTECTION AGAINST RETALIATION UNDER TITLE VII

The June 7, 2006 decision in this matter is premised upon the now pre-existing legal standard that an adverse action relate to the terms and conditions of employment. Based upon that presumption, the Court held that Roland Johnson did not establish a prima facie adverse employment action, citing Galabya for the proposition set forth in that matter that "[a] plaintiff sustains an adverse employment [3] action if he or she endures a "materially adverse change" in the terms and conditions of employment."

The Supreme Court stated in Burlington that the definition of retaliation under Title VII includes not only actions that are related to employment or occur at the workplace, but to include all actions that are "materially adverse" to a reasonable employee or job applicant, and that the anti-retaliation provision of Title VII extends beyond employment or work-related acts and harm.

Previously, many circuits required that the plaintiff employee show that the employer made an "ultimate employment decision," such as termination or a demotion, in order to support a claim for retaliation.

The Supreme Court rejected this standard in Burlington, opting instead for a "materially adverse" standard that would be judged objectively through the eyes of a reasonable employee in the plaintiff's position and depending upon the circumstances of the particular case.

The Supreme Court was careful to note that whether an adverse action is actionable depends upon the perspective of a reasonable person in the plaintiff's position. The Court stated that because an employer can effectively retaliate against an employee by taking actions not directly related to his/her employment or by causing him/her harm outside the workplace, limiting the conduct covered [4] by the anti-retaliation provision to conduct relating to employment would not fully achieve the purpose of the anti-retaliation provision.

The Supreme Court also held that the action or harm need not relate to the plaintiff's employment or workplace. It also held that the action or harm must be sufficiently severe such that it might have dissuaded a reasonable employee from making or supporting a charge of discrimination, concluding that the conduct covered by Title VII's anti-retaliation provision should not be limited to those acts that affect the terms and conditions of employment.

In sum, the anti-retaliation provision simply prohibits an employer from discriminating against an employee who has participated in protected activity. Roland Johnson's case should be permitted to be analyzed under this new legal standard. The series of events set forth in Roland Johnson's complaint should be analyzed under the new standard set forth in Burlington to determine whether those actions constitute "adverse employment actions" under Title VII based on the perspective of a reasonable person in Roland Johnson's position, and whether the actions or harms alleged are sufficiently severe such that it might have dissuaded a reasonable employee from making or supporting a charge of discrimination, in accordance with the Supreme Court's ruling in Burlington.

[5]

CONCLUSION

The Court should grant rehearing en banc and affirm the district court's Order in all respects.

Respectfully submitted,
s/ Christina A. Agola
Christina A. Agola [5]

Complaint, Dated December 29, 2005.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ROLAND JOHNSON,
Plaintiff,

v. CIVIL ACTION NO.
04-cv-6634 CJS

JOHN E. POTTER, COMPLAINT
Postmaster General,
UNITED STATES POSTAL SERVICE,
Defendant,

JURY TRIAL DEMANDED
PRELIMINARY INTRODUCTION

FIRST: This is an action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., as amended for retaliation and constructive discharge.

JURISDICTION AND VENUE

SECOND: Jurisdiction of this Court is specifically invoked pursuant to the aforementioned statutes, as well as 28 U.S.C. Section 1331, 1334, 1343(4) and 29 U.S.C. Sections 216(b).

[2]THIRD: Venue properly lies in th Western District of New York pursuant to 28 U.S.C. Section 1391(b) and 29 U.S.C. 1132 (e)(2), because the claims alleged herein arose in this judicial district.

FOURTH: Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Office on April 21, 2003, Case No. 4B-140-0036-03 alleging that he was subject to an ongoing pattern of retaliation between March 2002 through February 14, 2003 which then culminated in his constructive discharge on August 14, 2003. A Notice of Right to Sue was issued on December 17, 2004. (See Exhibit "A") Less than ninety (90) days have elapsed since the receipt of the Notice of Right to Sue since the filing of the instant complaint.

FIFTH: Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Office on June 21, 2003, Case No. 4B-140-0043-03 alleging discrimination based on race, sex, physical disability and in retaliation for prior EEO activity, when (1) subjected to sexual harassment by Manager Laura Lewis, most recently on or about May 7, 2003; and (2) after bringing the sexual [3] misconduct to the manager's attention, on May 14, 2003, Lewis verbally threatened Plaintiff, his job and threatened to alter Plaintiff's job duties. A Notice of Right to Sue was issued on December 22, 2004. (See Exhibit "B"). Less than ninety (90) days have elapsed since the receipt of the Notice of Right to Sue since the filing of the instant complaint.

SIXTH: The claims for retaliation herein were brought within 45 days, and are timely as per *29 C.F.R §1614.105.*

SEVENTH: The claim for "Constructive Discharge" herein was not exhausted as an EEO charge as per *29 C.F.R §1614.105.* Nonetheless, Plaintiff's constructive discharge claim is sufficiently related to the allegations in his EEO charges. Plaintiff contends that his discharge was due, at least in part, to defendant's "retaliatory conduct," and most of the incidents which Plaintiff cites as providing the basis

for his constructive discharge claim he had previously alleged were done to retaliate against him for his EEO complaints. As such, Plaintiff's EEO complaints prior to his constructive discharge [4] are sufficient to exhaust his administrative remedies under this and any other exception to *29 C.F.R §1614.105.*

FACTS COMMON TO ALL CAUSES OF ACTION

EIGHTH: Plaintiff is a disabled Veteran, having served two terms in the United States Marine Corps from 1975-1981 and 1982-1984, respectively.

NINTH: Plaintiff was honorably discharged in the rank of Sergeant in 1984.

TENTH: Plaintiff began employment with the defendant in 1985 with Veteran's Preference Status, with all the rights and privileges afforded to Plaintiff under American Postal Workers Union (hereinafter "APWU") Collective Bargaining Agreement (hereinafter "CBA")

ELEVENTH: Plaintiff had an exemplary work record during Plaintiff eighteen (18) year tenure with the defendant, having received many awards and commendations on the quality of Plaintiff's work. (Exhibit C).

[5]TWELFTH:In or about September 22, 1989, Plaintiff filed an Equal Employment Opportunity Office (hereinafter "EEO") complaint charging discrimination and retaliation, which eventually went to trial before the Honorable Charles J. Siragusa in November of 1998, *two (2) months after* assuming the position of a Claims and Inquiry Clerk, PS-5, and pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C §§2000e et, seq., in Federal District Court for the

Western District of New York, Docket No. 90-CV-07138.

THIRTEENTH: The issues at trial centered on Plaintiff claim that the defendant had demoted and denied Plaintiff promotional opportunities in retaliation for prior protected activities in violation of the CBA, and ultimately retaliated against Plaintiff for engaging in protected activity by abolishing Plaintiff position as a Window Clerk in the Box Section.

FOURTEENTH: Prior to the commencement of Plaintiff 1998 civil trial, Plaintiff was the successful bidder for the position of PS-Level 05 in or about September 1998; Plaintiff new supervisor was Mary Molenda [6] (hereinafter "Molenda").

FIFTEENTH: Plaintiff co-worker were Richard Lukonaitis ("Lukonaitis") who commenced his employment in or abut May 4, 1991, and Kathy Deneka ("Deneka") who began in August 7, 2003, both had less seniority than Plaintiff according to official postal documents.

SIXTEENTH: On November 20, 1998 Plaintiff filed a step 2 Grievance Appeal (USPS #: B94C-4B-C99053239) against supervisor Molenda alleging retaliatory harassment and retaliation for having engaged in protected activity.

SEVENTEENTH: On December 7, 1998 the American Postal Wokers' Union (hereinafter "APWU") and Plaintiff met with high level managers including Marketing Manager Karl Anderson (hereinafter "Anderson") and Fran McNamara (hereinafter "McNamara") to discuss Plaintiff claims of retaliation with management.

EIGHTEENTH: On January 6, 1999, Plaintiff believed the grievance was resolved.

[7]NINETEENTH: Five (5) months later on May 21, 1999, Plaintiff had to contact the President of the APWU to complain once again about Molenda's conduct. In turn, the APWU contacted District Manager Nicholas Fabozzi, (hereinafter "Fabozzi") to inform him of Molenda's discriminatory conduct.

TWENTIETH: On or about August 25, 2000, Plaintiff filed for informal EEO pre-complaint counseling (4B-140-0083-00) on the basis that Plaintiff had been subject once again to an ongoing continuing pattern of retaliatory harassment by Molenda for having engaged in protected activity.

TWENTY-FIRST: In particular, Plaintiff alleged that Molenda was unduly scrutinizing his work and the way Plaintiff handled money, in particular. Molenda was named in the August 2000 EEO charge as the "offending management official" responsible for taking retaliatory actions against Plaintiff.

TWENTY-SECOND: A formal complaint was accepted on October 30, 2000 by the EEO office, Case No. 4B-140-0083-00.

[8] TWENTY-THIRD: On November 1st and 7th of 2000, Plaintiff filed an amendment to Case No: 4B-140-0083-00 alleging a pattern of ongoing retaliatory harassment in retaliation for prior EEO activity.

TWENTY-FOURTH: In particular Plaintiff alleged that since filing for Informal Pre-Complaint EEO counseling on August 25, 2000, Molenda, in the presence of co-workers, began unduly scrutinizing and criticizing Plaintiff work.

TWENTY-FIFTH: The November 1st and 7th, 2000 amendments to charge 4B-140-0083-00 were acknowledged by the EEO office on November 9, 2000. (Exhibit K).

TWENTY-SIXTH: On November 20, 2000, Plaintiff filed an amendment to Case No: 4B-140-0083-00 alleging a pattern of continuing ongoing retaliatory harassment in retaliation for prior EEO activity.

TWENTY-SEVENTH: In particular, Plaintiff alleged that since filing for Informal Pre-Complaint counseling on August 25, 2000, Molenda, in the presence of co-workers, made verbal criticism of his work and treated Plaintiff in a disparate fashion as opposed to other [9] co-workers and that Plaintiff considered this retaliatory harassment.

TWENTY-EIGHTH: Plaintiff's November 20, 2000 amendments to charge 4B-140-0083-00 were acknowledged by the EEO office on November 27, 2000.

TWENTY-NINTH: On March 19, 2001, Plaintiff filed a charge with the National Labor Relations Board (hereinafter "NLRB") charging that Molenda had violated the CBA.

THIRTIETH: In particular, Plaintiff alleged that supervisor Molenda was attempting to abolish Plaintiff position as Claims and Inquiry Clerk, PS Level-05 in violation of Article 37 of the CBA.

THIRTY-FIRST: On May 21, 2001 Plaintiff filed for informal EEO pre-complaint counseling on the basis that Plaintiff was retaliated against for engaging in prior protected activity on the basis that supervisor Molenda attempted to rescind Plaintiff bid position in violation of the CBA in a continuing pattern of retaliatory harassment.

[10]THIRTY-SECOND: On October 19, 2001 a Notice of Final Decision was issued by the EEO office, along with a Notice of Right to Sue.

THIRTY-THIRD: On January 15, 2002, once again, Plaintiff filed a civil lawsuit in the Western District of New York Case Number alleging retaliation, *inter alia*.

THIRTY-FOURTH: On March 19, 2003, Plaintiff filed for informal EEO Pre-Complaint counseling on the basis that supervisor Molenda falsified Plaintiff time on or about February 18, 2003 and listed EEO case no. 4B-140-0083-00 and Plaintiff civil lawsuit, Case Number 002-CV-60255(s) as prior EEO protected activity.

THIRTY-FIFTH: On April 8, 2003, Plaintiff filed an Amended Complaint alleging continuing retaliation.

THIRTY-SIXTH: Thereafter, Plaintiff filed two EEO complaints alleging further retaliatory harassment which ultimately culminated in Plaintiff's leaving the defendant's employ on August 14, 2003. (4B-140-0036-03 and 4B-140-0043-03) As of November 5, 2004, Plaintiff have been apprised by the EEO that [11] a right to sue on those claims will issue in the next sixty (60) days.

THIRTY-SEVENTH: Molenda had been named as the offending management official in nearly all of Plaintiff's EEO charges and filings with the Union.

THIRTY-EIGHTH: On July 9, 2001, Mary Molenda filed an affidavit with the EEO; (Exhibit T); the EEO investigator claimed *"that Molenda admits she has been reviewing a lot of the things that [Johnson] does, and that she knows that [Johnson] has filed EEO complaints in the past.*

THIRTY-NINTH: Other management officials of the defendant were acutely aware that Plaintiff filed charges with the EEO, and that Plaintiff had complained about a continuing pattern of retaliatory harassment perpetrated by Molenda.

FORTIETH: In particular Anderson signed an EEO affidavit on July 10, 2001 in which he claimed his racial comments were references to "Star Wars."

[12]FORTY-FIRST: As a result of Plaintiff's engagement in protected activity, the Defendant has engaged in three forms of adverse employment action since Plaintiff's civil trial settled in November 1998 and in close temporal proximity with the myriad of EEO complaints Plaintiff have filed to protect Plaintiff's rights on this record, namely: (1) retaliatory harassment by co-workers and supervisors; (2) increased job responsibility, increased scrutiny, and diminution of job responsibilities and (3) failure to promote and "hand-picking" other postal employees over me for promotion.

FORTY-SECOND: Specifically, the defendant has (1), engaged in retaliatory harassment by engaging in the following conduct:

A. Derogatory Racial Comments;
B. Attempt to Rescind Plaintiff's Job;
C. Failure to Submit Annual Leave;
D. Tampering with Office Equipment;

FORTY-THIRD: The defendant has (2) increased unduly Plaintiff's job responsibilities, increased their scrutiny and criticism of Plaintiff and taken away certain job responsibilities.

[13]FORTY-FOURTH: The defendant (3) "hand picked" other postal workers over Plaintiff for promotion and also failed to apprise Plaintiff of promotional opportunities and as a result, Plaintiff was again denied promotional opportunities by the defendant for having engaged in protected activity.

FORTY-FIFTH: Each of these claimed acts of adverse employment action will be discussed *chronologically* as they occurred.

A. Increased Job Responsibility

FORTY-SIXTH: During Plaintiff's civil trial, in or about November 28, 1998, Molenda directed Plaintiff to keep a special "log" of *every single time* Plaintiff went into his overhead cabinet where money and registered mail was kept, and every single time money was removed from this cabinet, in addition to the normal log that identified "Matters Without Address Found in the Mails" that Plaintiff was required to keep. (Exhibit A, pp. 94, Lines 14-23; 95, Lines 1-10).

[14]FORTY-SEVENTH: No other postal employee under Molenda's supervision was subject to this treatment.

FORTY-EIGHTH: Plaintiff's predecessor Lester Morris was only required to maintain the "Matters Without Address Found in Mails" log and was not compelled to account for every time he either went into his cabinet or took money out. (Exhibit W).

FORTY-NINTH: Because at that time Plaintiff was settling his prior lawsuit for retaliation in federal court in which the terms of the settlement were to "drop all pending EEO complaints," instead of filing a complaint of Molenda's treatment with EEO, Plaintiff filed a grievance

with his union instead. (Exhibit).

B. Derogatory Racial Comments

FIFTIETH: Thereafter, in or about May 1999, Plaintiff reported Molenda's discriminatory conduct to Anderson, who reported it to Resetartis who then reported it to Fabozzi. Anderson said he "would talk to her." Plaintiff does not know if this happened, however.

[15]FIFTY-FIRST: Shortly thereafter Anderson remarked, "Roland you know we consider your side of the room as the *dark side* of the room," a reference to the fact that another African American postal worker and Plaintiff worked in a certain area of the room, and hence this was the "dark" side. (Exhibit V, Exhibit X).

FIFTY-SECOND: Anderson would later try to explain this racist comment as an off the cuff reference to "Star Wars."

FIFTY-THIRD: Anderson would also inform Plaintiff that it could be worse for Plaintiff under "another supervisor."

FIFTY-FOURTH: On or about May 29, 1999, Frank Resetarits, President of the APWU and Plaintiff met with Fabozzi to report Anderson's remarks and Molenda's disparity in treatment.

FIFTY-FIFTH: Instead of taking prompt remedial action, Fabozzi told Plaintiff in the presence of Resetartis that "he used to participate in the telling of racial jokes" and that it was "no problem." (Exhibit A, p.99, Lines 6-20).

[16]FIFTY-SIXTH: Frustrated that Fabozzi was not taking Plaintiff's complaints seriously, Plaintiff complained again to Resetaris.

FIFTY-SEVENTH: Resetaris wrote to Fabozzi on May 21, 1999 and complained that Molenda was acting in a discriminatory fashion against Plaintiff, and that Plaintiff had brought this to the attention of Anderson. (Exhibit X).

FIFTY-EIGHTH: As a side bar, Fabozzi did nothing to end this conduct; indeed, Fabozzi was the subject matter of numerous complaints against the defendant and was "let go."

FIFTY-NINTH: Commencing in or about December 2, 1999, Plaintiff found post-it notes attached all over Plaintiff's phone from Molenda that read "Roland Please Forward Your Calls When Away from Your Desk." (Exhibit Y).

SIXTIETH: Not until *after* Plaintiff complained about Molenda's conduct did she begin to post notes all over other co-workers phones. (Exhibit A, p. 103, Lines 6-9, emphasis added).

[17]SIXTY-FIRST: On or about January 2000, Plaintiff's co-workers Grove and Deneka were engaged in a loud conversation when Grove made inappropriate racist comments in Plaintiff's presence.

SIXTY-SECOND: Specifically, they were speaking about "blacks not wanting to work and standing on the corner selling drugs and stuff."

SIXTY-THIRD: These comments were reported to Molenda; no further action was taken to remedy this.

SIXTY-FOURTH: Indeed, rather than sanction either Grove or Deneka individually, Plaintiff was *admonished along with them* by Molenda for having engaged in this conduct as well, even thought Plaintiff had not engaged in such conduct.

SIXTY-FIFTH: On or about February 16, 2000 Molenda remarked "Roland drop everything and handle claims" for co-worker Deneka, while she and Deneka had a personal conversation over coffee in her office.

SIXTY-SIXTH: On March 6, 2000, Resetartis and Plaintiff met with Fabbozi once again regarding supervisor Molenda's continuing pattern of harassment and [18] preferential treatment extended to Deneka.

SIXTY-SEVENTH: At that meeting, Fabozzi proudly reminded Plaintiff of his "history" of making racial jokes.

SIXTY-EIGHTH: When asked by Fabozzi what Plaintiff was seeking as a resolution, Plaintiff responded that Molenda should be sent to sensitivity training. Fabozzi told Plaintiff that he would not send Molenda to sensitivity training for "just a sticky" a reference to the note she had placed on Plaintiff's phone on December 1999.

SIXTY-NINTH: No action was taken by the defendant to end this ongoing pattern or retaliatory harassment that had never ceased even after Plaintiff's 1998 civil trial.

C. Increased Job Responsibilities

SEVENTIETH: On August 18, 2000, Molenda informed Plaintiff's co-workers and Plaintiff that she was adding the duties of another Claims and Inquiry department in Rochester to Plaintiff *directly*, since the

defendant had decided to "centralize" both positions in Buffalo effective August 28, 2000.

[19]SEVENTY-FIRST: This occurred less that five (5) months after having complained about supervisor Molenda to Fabozzi.

SEVENTY-SECOND: At that juncture, Plaintiff was already performing the duties of two clerks (lost & found, broken parcels and claims) and was overwhelmed.

SEVENTY-THIRD: Plaintiff asked Molenda if she would provide assistance to Plaintiff because he was overwhelmed; she said "no," adding that "if anything she would consider creating a position for Kathy Deneka to assist her in Deneka's Complaints & Inquiry position."

D. Increased Job Scrutiny

SEVENTY-FOURTH: Immediately after Plaintiff filed his August 25, 2000 EEO charge, Molenda aggressively approached Plaintiff in front of others and remarked "I want to review the way you are doing things, the way you are doing them is probably wrong."

SEVENTY-FIFTH: Molenda would continue to repeat this comment on numerous occasions.

SEVENTY-SIXTH: Molenda then asked Plaintiff to start bringing his [19] trays of mail, that he had traditionally picked up from the Nixie Unit for years, *to her directly so that she could "examine them."*

SEVENTY-SEVENTH: Molenda then scrutinized Plaintiff's job responsibilities including "wallets, purses, Canadian coins" by maintaining an *itemized "list"* of

activities that he was performing which she gave to the union claiming that Plaintiff did not have enough work to do.

SEVENTY-EIGHTH: This data would later be used to substantiate her attempt to get rid of Plaintiff's position in violation of Plaintiff's Veteran's Preference and the CBA as described below.

SEVENTY-NINTH: Molenda kept no such "lists" for any other person under her supervision; Molenda did not scrutinize any other postal worker under her supervision in the fashion that she scrutinized Plaintiff; she admitted as much in her EEO affidavit.

EIGHTIETH: In or about August 30, 2000, supervisor Molenda wrote to the supervisor of the "Nixie Unit" and informed them that the work that Plaintiff normally perform in Lost and Found was being returned to [21] Nixie to avoid "double handling."

EIGHTY-FIRST: Plaintiff was not aware of this letter.

EIGHTY-SECOND: In or about October 11, 2000, Molenda then wrote to the "Nixie Unit" and told them to withhold trays of mail from Plaintiff, that Plaintiff has been responsible for handling since taking the position (Exhibit EE).

EIGHTY-THIRD: Plaintiff was never informed directly of her unilateral instructions to the Nixie Unit.

EIGHTY-FOURTH: No other postal employee under Molenda's supervision was subject to such scrutiny or diminution in job responsibilities, as admitted by Molenda. (Exhibit T)

E. Attempt to Rescind Plaintiff's Job by Molenda in Violation of Veterans Preference & Collective Bargaining Agreement

EIGHTY-FIFTH: On February 14, 2001, Molenda informed Plaintiff in a conference that she was going to "terminate" Plaintiff's position, and that Plaintiff could not use Plaintiff's "veteran's preference" to protect his bid [22] job.

EIGHTY-SIXTH: Molenda was incorrect. Plaintiff had appeal rights under the CBA which the defendant is amply aware of.

EIGHTY-SEVENTH: She further stated that she would create and post a "Complaints and Inquiry Clerk Position PS-6" to replace Plaintiff's position as "Claims and Inquiry Clerk PS-5" to assist co-worker Deneka, all in contradiction to the CBA, Plaintiff's bid rights, and Plaintiff's rights to appeal this action due to Plaintiff's preference eligible status as a disabled veteran.

EIGHTY-EIGHTH: On March 5, 2001 Plaintiff presented Molenda with an OWCP claim for aggravation of a pre-existing stress condition, namely diabetes; she signed for it on March 5, 2001.

EIGHTY-NINTH: On March 7, 2001, Molenda then gave "official notification" to Plaintiff's union of *her* unilateral decision to:

> "revert position...Claims and Inquiry Clerk, currently held by Roland Johnson"

[23]NINETIETH: The March 7, 2001 letter went on to say that she would post a "Complaints and Inquiry Clerk" Level 6 on March 16, 2001.

NINETY-FIRST: Curiously, that March 7, 2001 letter is copied to a K. Dittenhoffer, who was present during Plaintiff's November 1998 trial, and should have known better.

NINETY-SECOND: As for authority to make this decision, Molenda relied on "Article 37" of the CBA.

NINETY-THIRD: However, Molenda's reliance was unfounded; the CBA in effect at the time (Article 37) regarding "Filling Upgrade Positions" reads, in part:

a. When an occupied Clerk Craft position is upgraded on the basis of duties which are added to the position:

(1) The incumbent will remain in the upgraded job provided the employee has been in that job for more than one year the job will be posted for bid or Application in accordance with the agreement if the incumbent has not been in the job for more than one year.

[24]NINETY-FOURTH: At the time Molenda was seeking to terminate Plaintiff's position as PS-5, Plaintiff had been in the position since 1998 and hence Plaintiff was the "incumbent" entitled not only to remain in PS-5 job, but to have been offered any newly created position such as PS-6 of which Plaintiff was not.

NINETY-FIFTH: In retaliation for having named Molenda in numerous EEO filings, Molenda wanted to deliberately eradicate Plaintiff's job and create a new job that contractually should have been offered to Plaintiff in any event as per terms of the CBA.

NINETY-SIXTH: Molenda's actions were done without the union's consent, and in violation of Plaintiff's CBA rights and as a disabled veteran with veteran's preference, despite the fact that defendant claims Plaintiff was the "least junior senior claims and inquiry clerk"

NINETY-SEVENTH: Plaintiff's rights under the CBA in conjunction with his veteran's preference provided that all light duty employees and junior craft employees of which Plaintiff was neither, would have to be considered to be removed first before Plaintiff, a non-light duty-veteran senior craft employee.

[25]NINETY-EIGHTH: Plaintiff's union was faxed a copy of these restrictions by upper level management in or about February 28, 2001, yet they disregarded the terms of the CBA.

NINETY-NINTH: Molenda deliberately selected Plaintiff and Plaintiff's position before she had the legal obligation under the CBA and the Veteran's Preference Act to chose either Richard Lukonitis, a light duty worker, or Kathy Deneka, a junior craft employee within the Consumer Affairs Division.

ONE HUNDREDTH: Molenda was aware that both of these individuals had less seniority than Plaintiff, and that they had to be removed before Plaintiff, but explained to the union that she had to rescind Plaintiff's position due to a "decrease in workload."

ONE HUNDRED-FIRST: This disparate conduct was not unlike the very conduct that defendant engaged in previously that formed the basis for Plaintiff's 1998 trial; Plaintiff felt that he was clearly being targeted.

ONE HUNDRED-SECOND: Molenda's actions occurred nearly five months after Plaintiff filed two amendments of continuing retaliation were made to case number 4B-140-0083- [26] 00, both of which name Molenda as the offending management official.

ONE HUNDRED-THIRD: The union failed to enforce the terms of the CBA with reference to Article 6, Veterans Preference, despite the fact that Resetaris was faxed a copy of the regulations from Washington D.C. on February 28, 2001.

ONE HUNDRED-FOURTH: Because the union failed to assist Plaintiff in enforcing the terms of the CBA with regard to Plaintiff's veteran's preference, on April 16, 2001 Plaintiff had to file a claim with the Merit System Protection Board ("MSPB") which was received on April 18, 2001.

ONE HUNDRED-FIFTH: Finally, on April 30, 2001, Plaintiff received a letter from the union and management informing Plaintiff that finally, they were "rescinding" their attempts to take Plaintiff's position but would "*revisit the need for* Plaintiff's *job position in six months.*"

ONE HUNDRED-SIXTH: By "rescinding" their threatened attempt eradicate Plaintiff's PS-5 job, the defendant did not now have to contractually offer Plaintiff the PS-6 that they sought to create, claiming that they would now [27] place Plaintiff in a 6 month "observation period."

ONE HUNDRED-SEVENTH: On May 1, 2001, the union wrote that during Plaintiff's "*6 month observation period*" all Claims and Inquiry Clerks would now have to assist *Deneka*, a junior employee.

ONE HUNDRED-EIGHTH: In the interim, the retaliatory harassment did not cease.

F. Diminution in Job Duties

ONE HUNDRED-NINTH: On March 23, 2001 Molenda informed Plaintiff that Plaintiff no longer need to give her the mail that he pick up every day from the "nixie unit" and that she can just go and get it herself.

ONE HUNDRED-TENTH: This was four days after the APWU filed a Step 2 Grievance Appeal Form stating that the defendant had violated Articles 12, 2, 15, & 19 in attempting to eradicate Plaintiff's position in violation of the CBA in which Molenda was named in that grievance as the responsible decision maker in that grievance.

G. Failure to Submit Plaintiff's Annual Leave Request

[28]ONE HUNDRED-ELEVENTH: On August 15, 2001 Deneka was appointed by Molenda to handle her job tasks while she was on leave, including submission of leave slips to her directly for notification and approval.

ONE HUNDRED-TWELFTH: Plaintiff submitted a leave slip "Request for or Notification of Absence" on August 17, 2001.

ONE HUNDRED-THIRTEENTH: Deneka intentionally "forgot" to submit Plaintiff's annual leave request, although another postal worker was paid timely.

ONE HUNDRED-FOURTEENTH: Two weeks later, Molenda wrote another e-mail in which she then states that Deneka has no authority to enter any time and that she

must give leave slips to another supervisor.

ONE HUNDRED-FIFTEENTH: As a result, Plaintiff lost two hours of pay.

ONE HUNDRED-SIXTEENTH: This occurred three months after Plaintiff engaged in protected EEO activity once again on May 21, 2001 when Plaintiff filed for informal Pre-Complaint Counseling alleging retaliation for engaging in prior protected EEO activity as stated above.

[29]H. Tampering with Office Equipment

ONE HUNDRED-SEVENTEENTH: On July 23, 2001 Plaintiff returned to work to find Plaintiff's phone had been sabotaged and coated with a sticky-glue substance; Plaintiff's phone had to be replaced as a result.

ONE HUNDRED-EIGHTEENTH: In or about the same time everyone in Plaintiff's unit received new phone numbers or extensions besides Plaintiff; when Plaintiff asked why he was left out, Plaintiff was told, "not to look at her, she's just following orders."

ONE HUNDRED-NINETEENTH: Because Plaintiff did not receive a new phone extension Plaintiff received a decreased number of phone calls.

ONE HUNDRED-TWENTIETH: On November 2001, Plaintiff desk drawer was vandalized and the lock had been stripped; a locksmith had to be called in to fix the lock on November 28, 2001.

ONE HUNDRED-TWENTY FIRST: No one had ever touched Plaintiff's desk drawer before this.

[30]ONE HUNDRED-TWENTY SECOND: On December 10, 2001 a sign reading "keep out" was taped to Plaintiff's cubicle.

I. Falsification of Time Records

ONE HUNDRED-TWENTY THIRD: On February 18, 2003, Molenda falsified Plaintiff's time records so that Plaintiff's pay was short one hundred and fifteen dollars ($115.00); an emergency salary authorization had to be filed for Plaintiff to recoup this money.

ONE HUNDRED-TWENTY FOURTH: Plaintiff was warned two week earlier by another postal worker that this would occur.

ONE HUNDRED-TWENTY FIFTH: Plaintiff reported this to Molenda who claimed that she had no knowledge.

J. Failure to Promote

ONE HUNDRED-TWENTY SIXTH: Having failed to remove Plaintiff from his PS-Level 5 Claims and Inquiry Position, the District Manager appointed Laura Lewis as the new Marketing Manager (hereinafter "Lewis").

ONE HUNDRED-TWENTY SEVENTH: Plaintiff was confronted by Lewis upon her arrival to Plaintiff's unit; she claimed that she had "heard" [31] about him.

ONE HUNDRED-TWENTY EIGHTH: To dispel this negative undertone, Plaintiff resented her with all of Plaintiff's awards and commendations and informed her that he was interested in promotional opportunities.

ONE HUNDRED-TWENTY NINTH: In the post office in order to apply for promotional opportunities in the Clerk Craft, a "Clerk Craft Detail List" (hereinafter "CCDL") is established which consists of postal employee's seniority and skill levels so that when jobs open up, management is supposed to look at the list and based on the qualifications and seniority of the employee, choose someone for the position.

ONE HUNDRED-THIRTIETH: This is consistent with the Local Memorandum of Understanding on this issue.

ONE HUNDRED-THIRTY FIRST: However, Plaintiff would never be granted any promotional opportunities by Lewis because she was secretly "hand picking" other junior level postal employees for promotion, in particular, Deneka.

ONE HUNDRED-THIRTY SECOND: Nor would Plaintiff ever have the chance to apply [32] to apply for any promotional opportunities, because Plaintiff was never made aware of any promotional opportunities, including the EAS-13 position until *after* the position was filled.

K. Lewis Hand-Picked Deneka for Promotion

ONE HUNDRED-THIRTY THIRD: Because previous efforts to remove Plaintiff from his position had failed, and Plaintiff believed under the CBA that since Plaintiff was the incumbent, Plaintiff should have been awarded the PS-Level 6 Complaint and Inquiry position, regardless of whether he was on the Clerk Craft Detail List, yet Plaintiff remained in his PS-Level 5 position.

ONE HUNDRED-THIRTY FOURTH: Thus, Lewis was then tasked with finding another way to get around Plaintiff's seniority and Veteran Preference Status, so she

would have clear access to Plaintiff's position for elimination.

ONE HUNDRED-THIRTY FIFTH: At this juncture, Richard Lukonitis, a junior seniority disabled employee was sent back to his original unit, The Mailing Primary. He had been under Molenda's supervision for 5 years.

ONE HUNDRED-THIRTY SIXTH: Instead of allowing Plaintiff to train in the level 6 [33] position, they brought in a PS-Level 6 clerk, Helena Felker, ("Felker") from another unit, to train in Deneka's job.

ONE HUNDRED-THIRTY SEVENTH: In turn, Lewis hand selected Deneka to detail as her secretary.

ONE HUNDRED-THIRTY EIGHTH: Deneka was not listed on the CCDL.

ONE HUNDRED-THIRTY NINTH: This secretary detail should have been placed on the CCDL since it was a bargaining unit position, however it was not.

ONE HUNDRED-FORTIETH: Deneka was hand selected for other promotional details by Lewis, despite the fact that there were not listed on the clerk craft detail list.

ONE HUNDRED-FORTY FIRST: Logic would dictate that since Plaintiff was not on the CCDL, that Plaintiff too should have been offered these positions, particularly since Plaintiff had given Lewis all of his awards and commendations, Plaintiff had more seniority than Deneka, and had expressly informed her that Plaintiff was looking to gain promotional opportunities within the post office.

[34]ONE HUNDRED-FORTY SECOND: However, Plaintiff would not be "hand selected" by Lewis for such opportunities.

ONE HUNDRED-FORTY THIRD: The entire unit was outraged that Deneka was being "hand-picked" for these positions, when she in fact was the Junior clerk in the unit by seniority.

ONE HUNDRED-FORTY FOURTH: Lewis had bragged about this in front of Plaintiff. (Plaintiff's Affidavit, ¶ 140).

ONE HUNDRED-FORTY FIFTH: On 5/1/02 Lewis stated that she's "fought long and hard to get the use of an internal detail list."

ONE HUNDRED-FORTY SIXTH: Lewis had apparently created an "internal detail list" to promote postal workers who were not on the CCDL as was required.

ONE HUNDRED-FORTY SEVENTH: In further corroboration of this fact, in 2003 Lewis presented to the NLRB and Plaintiff a list in which Deneka is cited as holding the Temporary Assignment Position that she had created.

ONE HUNDRED-FORTY EIGHTH: However, the PS-Level 6 detail that Deneka was assigned to, should have been placed on the CCDL in accordance with the CBA Memorandum of Understanding of which neither Deneka nor [35] Plaintiff, was on.

ONE HUNDRED-FORTY NINTH: Deneka during this time was also given other higher-level assignments including, being placed in higher-level assignments when

Molenda was out of the office for the day or on vacation. (Exhibit OO).

ONE HUNDRED-FIFTIETH: Lewis acknowledges that the detail that Deneka was assigned to despite not being on the CCDL were for "acquiring important new skills for their own career development." (Exhibit OO), yet Plaintiff was not afforded such a chance, even though Lewis had all of Plaintiff's achievements and awards.

ONE HUNDRED-FIFTY FIRST: It simply did not matter to the defendant whether a postal employee was listed on the CCDL or not.

ONE HUNDRED-FIFTY SECOND: Despite being apprised of Plaintiff's desire for promotional opportunity, Plaintiff was never offered any promotional opportunities whatsoever.

1. EAS-13 Position Not Posted:

ONE HUNDRED-FIFTY THIRD: Lewis utilized this "internal detail list" so that she could ultimately promote Deneka to the EAS-13 [36] position, without ever offering Plaintiff the chance to apply for this promotional opportunity and instead "hand picking" again Deneka for this promotional opportunity.

ONE HUNDRED-FIFTY FOURTH: This EAS-13 position would have resulted in not only a higher level of responsibility, but would also have increased Plaintiff pay, and benefits.

ONE HUNDRED-FIFTY FIFTH: On June 30,2002 Plaintiff received an e-mail from Lewis mentioning a Temporary Assignment Candidate Program, yet it did not

mention the EAS-13 job position, nor were there any attachments indicating what positions were available or being offered.

ONE HUNDRED-FIFTY SIXTH: On or about September 16, 2002 Deneka started training with Diane Mineo in the EAS-13 job.

ONE HUNDRED-FIFTY SEVENTH: This was consistent with what Mineo had informed Plaintiff of earlier, i.e. that "we're trying to keep Kathy, we're trying to convert Kathy's level six up to a higher level."

ONE HUNDRED-FIFTY EIGHTH: Two months later, Plaintiff received an e-mail on November 29, 2002 *congratulating* Deneka for [36] obtaining the promotional opportunity in the EAS-13 position.

ONE HUNDRED-FIFTY NINTH: Plaintiff never had the chance to apply for EAS position because it was never posted, and Plaintiff never saw it; indeed, after Plaintiff learned that Deneka had been awarded this position, Plaintiff may have even been ill so that Plaintiff had missed the posting. Plaintiff later learned that the job was never posted.

ONE HUNDRED-SIXTIETH: On February 5, 2003, Plaintiff attempted to locate the job posting on the internet Human Resources Job Opportunities System Search, which did not yield the posting:

> All vacancies posted on and after 10/16/2002
> There are no job opportunities listed at this time

ONE HUNDRED-SIXTY FIRST: The first Plaintiff saw a "List of Applicants" for the EAS-13 position would be

months after the position was filled. The Confidential "List of Applicants" claims that Deneka is the first person on the list during the date of vacancy from 10/08/02 through 10/24/02; however, Deneka was [38] already training in this position a months earlier.

ONE HUNDRED-SIXTY SECOND: Plaintiff then located a posting for the EAS-13 position which was dated 4/30/02, Closing date 7/31/02, months before the 10/08/02 vacancy was claimed to have been posted.

ONE HUNDRED-SIXTY THIRD: Plaintiff never witnessed this job posting either.

ONE HUNDRED-SIXTY FOURTH: As a result of the defendant creating their own "list" for the purposes of "hand picked" promotions in contradiction to the CBA, and in promoting Deneka who was less senior to Plaintiff and by transferring less senior postal employees, Plaintiff was now considered the "least senior" in Plaintiff Level 5 position, since all the remaining Complaint and Inquiry Clerks, Judy Grove and Bill Maturski, are all senior to Plaintiff.

ONE HUNDRED-SIXTY FIFTH: Should any of the three Claims and Inquiry positions need to be abolished as Defendant had attempted earlier without success, Plaintiff would be the next person in line to be terminated because of Plaintiff lack of seniority. [38]

ONE HUNDRED-SIXTY SIXTH: This status greatly concerned Plaintiff due to the declaration of management that they would "review the need for Plaintiff position again in six months" after they unsuccessfully attempted to rescind Plaintiff position initially.

ONE HUNDRED-SIXTY SEVENTH: On March 19, 2003 Plaintiff filed for informal EEO Pre-Complaint counseling on the basis that supervisor Molenda falsified his time on or about February 18, 2003; Plaintiff listed EEO case number 4B-140-0083-00 and Plaintiff's 2002 civil lawsuit (02-CV-60255(S) as prior EEO protected activity.

ONE HUNDRED-SIXTY EIGHTH: On April 8, 2003, Plaintiff filed and Amended Complaint to 02-CV-60255(S) alleging an ongoing pattern of retaliation.

ONE HUNDRED-SIXTY NINTH: On April 21, 2003, Plaintiff fled a formal complaint in Case No. 4B-140-0036-03 alleging continuous harassment from March 2002 through February 14, 2003 in that Plaintiff was required to provide excessive documentation for his FMLA claims, that Plaintiff's supervisor falsified his time card resulting in non-payment of one day's pay on February 14, 2003, and that management failed to [40] promote Plaintiff when it promoted another postal employee.

ONE HUNDRED-SEVENTIETH: On April 24, 2003, a letter was drafted to the Postal Inspection Service complaining about supervisor Molenda.

ONE HUNDRED-SEVENTY FIRST: Plaintiff's complaint was partially accepted and denied on May 20, 2003.

ONE HUNDRED-SEVENTY SECOND: On May 15, 2003, Plaintiff filed for informal pre-complaint counseling on the basis that he was subject to ongoing retaliation, sexual harassment and verbal threats about his job and about being terminated after he had written a letter to manager Laura Lewis to stop harassing him.

ONE HUNDRED-SEVENTY THIRD: Plaintiff filed a formal EEO complaint with regard to case number 4B-140-0043-03 on June 12, 2003.

ONE HUNDRED-SEVENTY FOURTH: Manager Lewis confronted him about the letter he wrote to her, stating "why don't you be a man and talk about the letter" that she knew what Plaintiff's "problem" was , it was that Plaintiff was seeing "dollar signs" and that it wasn't going to happen off "her career." [40]

ONE HUNDRED-SEVENTY FIFTH: Lewis said that she used to think very highly of Plaintiff, but that she doesn't anymore.

ONE HUNDRED-SEVENTY SIXTH: Lewis then began discussing Plaintiff's most recent EEO claim against Molenda falsifying Plaintiff's time card; Lewis claimed that she was aware that Plaintiff was afraid of losing his job, but that if anyone were to be fired, he would be "the first to go."

ONE HUNDRED-SEVENTY SEVENTH: Plaintiff left his employment with the defendant on or about August 14, 2003 due the unabated retaliatory harassment that Plaintiff suffered, punctuated by threats of termination by those who were aware that Plaintiff engaged in protected activity, which Plaintiff could no longer withstand as a term and condition of his employment which had become so deliberate and intolerable, viewed as a whole in it's cumulative, unabated nature, that Plaintiff was compelled to resign.

ONE HUNDRED-SEVENTY EIGHTH: On September 4, 2003, Plaintiff filed for informal pre-complaint counseling for constructive discharge for unabated, unchecked persistent [42] harassment; the EEO refused to accept Plaintiff's complaint for constructive discharge

FIRST CAUSE OF ACTION

ONE HUNDRED-SEVENTY NINTH: Plaintiff repeats and realleges by reference each and every allegation contained in paragraphs ONE through ONE HUNDRED-SEVENTY EIGHTH and incorporates the same herein as though fully set forth herein.

ONE HUNDRED-EIGHTIETH: Plaintiff engaged in protected activity when he made both informal and formal EEO complaints on March 19, 2003, April 21, 2003, May 15, 2003, June 12, 2003. Shortly thereafter, he was subject to adverse employment action, including threats to terminate his position, falsifying his time card, and ultimately, his constructive discharge in retaliation for having engaged in said protected activity.

ONE HUNDRED-EIGHTY FIRST: As a direct and proximate result of Defendant's willful, knowing and intentional discrimination against him, Plaintiff has suffered and will continue to suffer pain and suffering and extreme and severe mental anguish and emotional anguish [43] and emotional distress; he has incurred and will continue to incur medical expenses for treatment by health care professionals, and for other incidental expenses, and he has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

ONE HUNDRED-EIGHTY SECOND: As a further and proximate result of Defendant's violations of the Civil Rights Act of 1964, Plaintiff has been compelled to retain the services of counsel in an effort to enforce the terms and conditions of the employment relationship with Defendants and each of them, and has incurred and will continue to incur, legal fees and costs, the full nature and extent of

which are presently unknown to the Plaintiff. Plaintiff requests that attorney fees be awarded.

ONE HUNDRED-EIGHTY THIRD: Plaintiff is informed and believes, and based thereon alleges, that the outrageous conduct of Defendant described above was done with fraud, oppression and malice, with a conscious disregard for his rights, and with the intent, design, and [44] purpose of injuring him. Plaintiff is further informed and believes that Defendant authorized, condoned and/or ratified the unlawful conduct alleged herein, specifically.

SECOND CAUSE OF ACTION

Constructive Discharge

ONE HUNDRED-EIGHTY FOURTH: Plaintiff repeats and realleges by reference by reference each and every allegation contained in paragraph ONE through ONE HUNDRED- EIGHTY THREE, and incorporates the same herein as though fully set forth.

ONE HUNDRED-EIGHTY FIFTH: Plaintiff is informed and believes, and based thereon alleges, that he was constructively discharge from his employment solely as a consequence of engaging in the aforementioned litany of protected activity.

ONE HUNDRED-EIGHTY SIXTH: As a direct and proximate result of Plaintiff's constructive discharge, Plaintiff has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress. Plaintiff has suffered and will continue to suffer a loss of earnings ans other employment [45] benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

ONE HUNDRED-EIGHTY SEVENTH: Defendants' conduct as described herein was malicious and oppressive, and done with a conscious disregard of Plaintiff's rights. The act of Defendants were performed with the knowledge of an employer's economic power over its employees. Defendants, through its officers, managing agents and/or supervisors, and [Defendant CEO], authorized condoned and ratified the unlawful conduct of the Defendants in this action.

Dated: December 29, 2004
Rochester, New York

By: /s/ CHRISTINA A. AGOLA, ESQ/
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No. 06-1172

In the Supreme Court of the United States

ROLAND JOHNSON, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that petitioner's employment discrimination claims that were or could have been raised in petitioner's prior lawsuit were barred by res judicata.

2. Whether the court of appeals properly rejected petitioner's constructive discharge claim.

3. Whether the court of appeals properly rejected petitioner's remaining retaliation claim.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 9

TABLE OF AUTHORITIES

Case:

Burlington N. & Santa Fe Ry. v. *White*, 126 S. Ct. 2405 (2006) 4, 7

Statutes:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 2
42 U.S.C. 2000e-3(a) 7, 8
42 U.S.C. 2000e-16 (2000 & Supp. IV 2004) 5, 8
42 U.S.C. 2000e-16(a) (2000 & Supp. IV 2004) ... 5, 9
Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A6) is not published in the *Federal Reporter*, but is reprinted in 184 Fed. Appx. 138. The opinion of the district court (Pet. App. A9-A39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2006. A petition for rehearing was denied on November 29, 2006 (Pet. App. A1-A2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, petitioner filed an employment discrimination suit against the United States Postal Service (Postal Service), alleging that the Postal Service had

denied him a promotion because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. A5. The parties eventually agreed to settle the case. *Ibid.* In January 2002, petitioner filed a second Title VII lawsuit against the Postal Service (*Johnson II*), alleging that his supervisors had engaged in acts of retaliation against him because he had filed the first suit. *Ibid.* The district court granted summary judgment to the Postal Service, and the court of appeals summarily affirmed. *Id.* at A4-A6.

2. While the second lawsuit was still pending, petitioner filed a third Title VII lawsuit against the Postal Service (*Johnson III*), this time alleging both retaliation and constructive discharge. The district court granted summary judgment to the Postal Service on both claims. Pet. App. A9-A39.

The district court first held that all but two of petitioner's claims had been rejected in *Johnson II*, and that petitioner's effort to relitigate those claims was therefore barred by res judicata. Pet. App. A35-A36. The court identified petitioner's remaining two claims as a claim that a Postal Service administrator had allegedly retaliated against him by requiring excessive documentation to support his claim for leave under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, and a claim that a supervisor had allegedly retaliated against him by telling him, inter alia, that "if anyone were to be fired, he would be the first to go." Pet. App. A22, A35.

The district court held that the "excessive documentation" claim was barred by res judicata because petitioner could have raised that claim in *Johnson II*, but failed to do so. Pet. App. A35-A36. The court also concluded that petitioner's "excessive documentation" claim

failed on the merits, both because petitioner failed to establish that he had suffered an adverse employment action, and because petitioner failed to refute the Postal Service's evidence that the administrator had no knowledge of petitioner's protected activity. *Id.* at A36.

The district court rejected petitioner's claim that his supervisor's remarks constituted actionable retaliation. Pet. App. A22. The court concluded that the alleged remarks were insufficient to constitute an adverse employment action. *Id.* at A36. The court also concluded that petitioner had failed to refute the supervisor's legitimate non-discriminatory explanation for the remark about petitioner being the first to go. *Id.* at A36-A37.

The district court also ruled against petitioner on his constructive discharge claim. Pet. App. A37-A38. The court concluded that collateral estoppel barred most of the underlying allegations, but that even if collateral estoppel did not apply, the allegations fell far short of establishing constructive discharge. *Ibid.*

The district court also concluded that petitioner was not entitled to additional discovery on his retaliation and constructive discharge claims. Pet. App. A34-A35. The court explained that petitioner had ample opportunity to conduct discovery in *Johnson II*, and that petitioner had not shown how additional discovery would assist his claims. *Ibid.*

3. The court of appeals summarily affirmed by an unpublished decision. Pet. App. A3-A6. The court held that res judicata barred all of petitioner's claims that were or could have been litigated in *Johnson II*. *Id.* at A5. The court held that petitioner's new allegations of retaliation were insufficient to constitute actionable retaliation because a necessary element of a retaliation claim is an "adverse employment action," and petitioner

had failed to satisfy that element. *Ibid.* The court of appeals also held that petitioner's allegations were insufficient to support an inference of constructive discharge. *Ibid.* Finally, the court of appeals held that the district court did not abuse its discretion in failing to grant petitioner additional discovery. *Id.* at A6.

4. After the court of appeals issued its summary affirmance, this Court decided *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006) (*Burlington Northern*). In that case, the Court held that a plaintiff alleging retaliation "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (citation and internal quotation marks omitted). In a petition for rehearing, petitioner argued that the court of appeals' decision relied on a definition of retaliation that was inconsistent with the *Burlington Northern* standard. The petition for rehearing was denied. Pet. App. A1-A2.

ARGUMENT

Petitioner contends that the decision below conflicts with this Court's decision in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). For all but one of petitioner's claims, the court of appeals ruled in favor of the Postal Service for reasons unrelated to the holding in *Burlington Northern*. With respect to one claim, the court relied on a standard for retaliation that is different than the one announced in *Burlington Northern*. But petitioner brought *Burlington Northern* to the court's attention in his petition for rehearing, and the court denied the petition; the question whether peti-

tioner's allegations meet the *Burlington Northern* is fact-bound; and a plaintiff seeking to prove a retaliation claim against the federal government must show that alleged retaliation took the form of a "personnel action[]," 42 U.S.C. 2000e-16(a) (2000 & Supp. IV 2004), a requirement that petitioner has failed to satisfy here. The petition for a writ of certiorari should therefore be denied.

1. The district court dismissed all but two of petitioner's retaliation claims on the ground that it had rejected them in an earlier lawsuit and that petitioner's effort to relitigate them was therefore barred by res judicata. Pet. App. A35-A36. The district court also dismissed one of the two remaining retaliation claims —the "excessive documentation" claim—on res judicata grounds, explaining that petitioner had the opportunity to include that claim in the earlier lawsuit but had not done so. *Ibid.* The court of appeals affirmed those res judicata rulings. *Id.* at A5. The court held that "[t]he District Court correctly determined that, in so far as [petitioner] alleged claims for retaliation that were [or] could have been raised in *Johnson II*, his claims were barred by res judicata." *Ibid.* Because nothing in *Burlington Northern* has any bearing on the doctrine of res judicata, *Burlington Northern* provides no basis for reexamining those fact-bound claims, and they otherwise do not merit review.

2. *Burlington Northern* also has no bearing on the dismissal of petitioner's constructive discharge claim. The court of appeals held that petitioner's allegations "fall far short of establishing a constructive discharge." Pet. App. A5. The court explained that petitioner's allegations "do not legally suffice to sustain an inference that a reasonable person would have been compelled to

resign." *Id.* at A5-A6 (citation and internal quotation marks omitted). Because *Burlington Northern* addressed the standard for proving retaliation, and did not address the standard for proving a constructive discharge, *Burlington Northern* provides no basis for reexamining petitioner's constructive discharge claim. Likewise, that fact-bound claim does not otherwise merit review.

3. *Burlington Northern* is also inapplicable to petitioner's claim that he was entitled to conduct additional discovery. The district court denied petitioner's request for additional discovery because petitioner "already had a full opportunity" to conduct discovery in *Johnson II*, and because petitioner failed to show that additional discovery "would be helpful." Pet. App. A34. The court of appeals affirmed, explaining that petitioner "had already enjoyed a full opportunity to conduct discovery in *Johnson II*," and that petitioner "failed to identify any new facts as to which he needed discovery that might reasonably [be] expected to raise a genuine issue of material fact." *Id.* at A6 (brackets in original; citation and internal quotation marks omitted). Petitioner has not offered any basis for revisiting those determinations in light of *Burlington Northern*. In particular, he has not identified any facts that he sought to uncover through discovery that were irrelevant under the standard applied by the court of appeals, but relevant under *Burlington Northern*. And that claim does not otherwise merit review.

4. That leaves only petitioner's claim that his supervisor's remarks constituted actionable retaliation. Petitioner alleges that, after he wrote a letter to his supervisor complaining of harassment, his supervisor "confronted him about the letter," stating "why don't you be

a man and talk about the letter." Pet. App. A73. According to petitioner, his supervisor also stated that she knew that petitioner's "problem" was that he was "seeing 'dollar signs,' and that it wasn't going to happen off 'her career.'" *Ibid.* Petitioner also alleges that his supervisor told him that "if anyone were to be fired, he would be 'the first to go.'" *Ibid.*

The district court dismissed the claim on the ground that those remarks did not establish an adverse employment action, either separately or together. The district court also held that petitioner had failed to rebut the legitimate non-discriminatory reason for the "first to go" comment—that the Postal Service had legitimate business reasons for eliminating petitioner's position and that he had the least seniority among the clerks. Pet. App. A36-A37. The court of appeals affirmed, holding that the alleged comments were insufficient to establish an "adverse employment action." *Id.* at A5.

In *Burlington Northern*, the Court held that a plaintiff alleging retaliation under 42 U.S.C. 2000e-3(a) need not establish that a challenged action is "employment-related." 126 S. Ct. at 2414. Instead, the Court held that such a plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (citation and internal quotation marks omitted). The court of appeals issued its decision prior to this Court's decision in *Burlington Northern*, and it did not apply the *Burlington Northern* standard in assessing the legal sufficiency of petitioner's claim that his supervisor's comments constituted actionable retaliation. For several reasons, however, there is no need in this case to

vacate the judgment and remand the case for reconsideration in light of *Burlington Northern*.

First, the court of appeals had an opportunity to reconsider its decision in light of *Burlington Northern*, and it refused to alter the result. In his petition for rehearing, petitioner argued that *Burlington Northern* required the court of appeals to vacate its decision. The court of appeals, however, denied the petition for rehearing.

Second, the supervisor's alleged remarks do not necessarily constitute actionable retaliation under the *Burlington Northern* standard. That is particularly true when the comments are interpreted in the context in which they were allegedly made—that the Postal Service had legitimate business reasons for eliminating petitioner's position and that petitioner had the least seniority among the clerks. Pet. App. A36-A37. In addition, the comment about a "firing" ("if anyone was fired, he would be the first to go") was not addressed specifically to petitioner but instead was made in the subjective as to "anyone." And petitioner does not allege that anyone at the Postal Service ever attempted to fire him. The question whether the alleged remarks satisfy the *Burlington Northern* standard is fact-bound and therefore does not warrant review.

Third, *Burlington Northern* established the standard for proving retaliation under the anti-retaliation prohibition in Section 2000e-3(a), and that prohibition does not apply to the federal government. Instead, any retaliation claim against the federal government must be brought under 42 U.S.C. 2000e-16 (2000 & Supp IV 2004), which expressly limits the federal government's waiver of sovereign immunity to "personnel actions affecting" federal employees. Petitioner has failed to ex-

plain how the supervisor's alleged remarks could constitute a "personnel action[ ]" within the meaning of Section 2000e-16(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2007